

6-1-1993

Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction

John Charles Boger

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

John C. Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573 (1993).
Available at: <http://scholarship.law.unc.edu/nclr/vol71/iss5/10>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

TOWARD ENDING RESIDENTIAL SEGREGATION: A FAIR SHARE PROPOSAL FOR THE NEXT RECONSTRUCTION

JOHN CHARLES BOGER*

I. INTRODUCTION

The keenest scholars who have written on residential segregation in the post-Kerner Commission era agree on two things: Segregation has devastating social consequences, and it is apparently intractable. Their deep pessimism stems in part from their doubt that Americans will ever summon the political will to end segregation. In larger measure, however, their writings reflect uncertainty whether effective governmental policies can be fashioned to overcome metropolitan racial divisions. In a nation unwilling to dictate housing choices to the private market, all governmental policies to promote racial or economic integration must confront the harsh judgments of the marketplace, where housing consumers are free to leave (or refuse to enter) an integrating community, thereby assuring its resegregation.

This Essay proposes a policy tool, a National Fair Share Act, that would create new market incentives to support integrative housing choices and provide market disincentives to discourage segregative choices.¹ The legislation has three features:

(i) Drawing upon lessons learned from the nation's attempt to end racial segregation in voting, public education, and employment, and from New Jersey's experience with "fair share" housing legislation, the Act

* Associate Professor of Law, University of North Carolina at Chapel Hill. B.A. 1968, Duke University; M.Div. 1971, Yale Divinity School; J.D. 1974, University of North Carolina at Chapel Hill. My special thanks to law students Lisa Frye, Leigh McAfee, Lee Robinson, and Alfred Walker for their fine research assistance on this essay.

1. The central features of the Fair Share legislation have several predecessors. In a magisterial article, James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 How. L.J. 547 (1979), Professor Kushner suggested a variant of this proposal, although without exploring its potential for redirecting market incentives. *Id.* at 671-75. Professor Derrick Bell recently has mused about a "Racial Preference Licensing Act," under which governments would redirect market forces by licensing racially discriminatory conduct in exchange for payment of a fee that would be used to underwrite black economic development. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 47-52 (1991); see also Michelle J. White, *Suburban Growth Controls: Liability Rules and Pigovian Taxes*, 8 J. LEGAL STUDIES 207, 225-30 (1979) (suggesting that suburban exclusionary zoning regulations should be taxed to offset their external social and economic costs).

would require the designation of concrete housing goals for every municipality that has not yet assumed its "fair share" of racially and economically integrated housing.

(ii) As an incentive, the Act would promise to disperse new federal housing funds through state governments to all municipalities that choose to shoulder their "fair share" housing obligations. As a disincentive, this legislation would modify the federal tax code so that property holders in municipalities that choose to ignore their prescribed housing goals would progressively lose their mortgage interest and property tax deductions. These tax code modifications would have a dual purpose: First, to prompt citizens to encourage municipalities to comply with federal law, thereby hastening metropolitan integration; second, to reverse the economic advantages that currently flow toward property holders in segregated communities.

(iii) Mindful that local participation is crucial to success, the legislation would grant local municipalities great flexibility in devising plans to meet their fair share obligations. Moreover, as amplified below, the legislation would permit each municipality to opt for an integration emphasis or a low-income housing emphasis.

Before examining the specifics of the National Fair Share proposal, this Essay will briefly contrast the basic remedial strategy of the Fair Housing Act of 1968 (the principal federal statute available to combat housing segregation) with strategies embodied in three other civil rights statutes (the Voting Rights Act of 1965, and Titles VI and VII of the Civil Rights Act of 1964), each of which has proven more effective in achieving compliance. Next it will examine a housing strategy that approximates the successful approach of the federal voting, public education, and employment statutes—the "fair share" housing legislation developed in New Jersey during the 1980s. After noting several weaknesses in the New Jersey legislation, the Essay will introduce a strengthened alternative, the National Fair Share Act.

A. The Persistence of Residential Segregation

In 1968, the Kerner Commission warned that America's residential areas were drifting toward racial polarization: The nation's central cities were disproportionately becoming home to an impoverished, African-American² minority, while the growing suburbs increasingly were popu-

2. Editor's Note: The contributors to this symposium have used the terms "African American," "black," and "black American," often interchangeably, in their articles. The *North Carolina Law Review* has elected to defer to its contributors' choices in the absence of any universally accepted racial or ethnic designation.

lated by a more prosperous white majority.³ The Commission cautioned that this residential isolation would inflict grave economic disadvantage on African Americans,⁴ and simultaneously would spell social and economic decline for many American cities.⁵

As the Introduction to this Special Issue reveals, subsequent developments largely have confirmed the Kerner prognosis: Urban geography apparently has contributed substantially in the intervening twenty-five years to the maintenance, if not the intensification, of racial subordination.⁶ Although the starkness of the present residential apartheid is obscured by the visible progress of a minority of African Americans who have attained uneasy middle-class economic status,⁷ even this black middle class has not experienced the degree of residential mobility that should have accompanied their economic success.⁸ Moreover, residential segregation continues to confine most blacks in urban areas to employment and housing markets that are economically inferior;⁹ many live in

3. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1-2, 10 (Bantam Books 1968).

4. *Id.* at 23-29.

5. *Id.* at 21-23. Fourteen of America's 25 largest cities decreased in population between 1970 and 1980. Anthony Downs, *The Future of Industrial Cities*, in *THE NEW URBAN REALITY* 281, 281 (Paul E. Peterson ed., 1985). Long-term decline is predicted for many larger, older cities, especially in the Northeast and North Central states. *Id.* at 282-83. Those American cities currently in decline, moreover, contain relatively higher percentages of African Americans. For example, in the 14 declining cities mentioned above, African Americans comprised 34.4% of the population; among central cities as a whole, African Americans constitute a much smaller percentage, only 22.5%. *Id.* at 281.

6. See generally John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect, An Introduction*, 71 N.C. L. REV. 1289 (1993) (suggesting that, despite significant achievements, urban blacks still lag far behind suburban whites in employment rates, average income, and access to quality education, health care, housing, and other social services).

7. See REYNOLDS FARLEY & RICHARD R. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 289-90 (1987). Farley and Allen note that middle-income blacks in the mid-1980s were far less secure in their overall economic circumstances than were equivalent middle-income whites, in part because of significantly lower levels of total wealth: "[R]acial differences in wealth are very much greater than racial differences in current income. . . . [B]lack households in late 1984 had monthly incomes which were 62 percent of those of white households, but their median assets were only 9 percent of those of whites." *Id.*

8. ROBERT W. LAKE, *THE NEW SUBURBANITES: RACE AND HOUSING IN THE SUBURBS* 239 (1981) ("The suburbanization of blacks is being accompanied by the increasing territorial differentiation of suburbia along racial lines—and not by integration."); see also GARY ORFIELD & CAROLE ASHKINAZE, *THE CLOSING DOOR: CONSERVATIVE POLICY & BLACK OPPORTUNITY* 69-102 (1991) (reporting that Atlanta's housing market is racially segregated at all income levels); Phillip L. Clay, *The Process of Black Suburbanization*, 14 URB. AFF. Q. 405, 416-19 (1979) (describing the persistence in suburban communities, at all but the highest income levels, of a "racially segmented housing market").

9. See, e.g., Margery Austin Turner, *Discrimination in Urban Housing Markets: Lessons from Fair Housing Audits*, 3 HOUSING POL'Y DEBATE 185, 210 (1992).

segregated neighborhoods that are debilitated by private disinvestment¹⁰ and are underserved by grossly inadequate education, health care, public safety, and other municipal services.¹¹

B. Residential Segregation—An “Inevitable Consequence?”

One of the most striking aspects of racial segregation in 1993 is the national sense that it is inescapable. Despite hard-won legal successes against other forms of racial discrimination in public and private life,¹² residential segregation is widely viewed as an “inevitable consequence” of economic inequality between blacks and whites, of the private preferences of minority renters and homeowners, or of inexorable sociological and economic forces.

Those who point to income differences between blacks and whites or to black neighborhood preferences in explaining residential segregation rarely find it problematic. These observers view segregation as a by-product of our American commitment to free markets and private choices.¹³ A careful review of the evidence demonstrates, however, that neither income inequality nor African-American preferences suffice to

10. Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOC. 329, 345 (1990) (noting that racially and economically segregated neighborhoods are often so fragile that normal economic downturns “rapidly bring about the failure of most nonessential businesses and the elimination of services that depend on the ability of clients to pay”).

11. In their careful study of residential mobility in Philadelphia, Douglas Massey and his colleagues report that middle-class blacks “have a difficult time achieving a spatial outcome commensurate with their [socioeconomic status].” Douglas Massey et al., *Effects of Residential Segregation on Black Social and Economic Well-Being*, 66 SOC. FORCES 29, 42 (1987). “[P]atterns of residential segregation have separated blacks and whites [in Philadelphia] into two vastly different environments: one that is poor, crime-ridden, unhealthy, unsafe, and educationally inferior, and another that is markedly richer, safer, healthier, and educationally superior.” *Id.* See Boger, *supra* note 6, at 1321-31.

12. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a-a6 (1988)) (outlawing racial discrimination in public accommodations), 2000c-c9 (in public education), 2000d-d7 (in federally assisted programs), 2000e (in private employment)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973bb-4 (1988)) (in voting rights); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965) (in federal employment); Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970), superseded by Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970) (by federal contractors).

13. Of course, any justification of residential segregation that relies upon present differences in the economic status of blacks and whites must respond to evidence that residential location itself is a crucial factor in determining a resident's economic success. See, e.g., George C. Galster & Mark Keeney, *Race, Residence, Discrimination & Economic Opportunity*, 24 URB. AFF. Q. 87 (1988); John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUSING POL'Y DEBATE 371 (1992).

explain current patterns of housing segregation.¹⁴ While black citizens, on average, have lower incomes (and thus less residential mobility) than whites, blacks *at all income levels* continue to face widespread exclusion from neighborhoods they can afford.¹⁵ Indeed, housing discrimination against blacks remains far more pronounced than that confronted by other ethnic groups, including non-black Hispanics and Asians in similar economic circumstances.¹⁶ Nor do minority housing preferences—the “birds of a feather” explanation—adequately explain America’s segregated living patterns. Numerous attitudinal studies confirm that a substantial majority of African Americans would prefer to live in racially integrated residential neighborhoods if they could move without threats of violence or hostility from their new neighbors.¹⁷

Two other theories, less benign than income differences or black neighborhood preferences, offer more plausible explanations for America’s continuing housing segregation: (1) illegal housing discrimi-

14. Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 885-88 (1988).

15. John O. Calmore, *To Make Wrong Right: The Necessary & Proper Aspirations of Fair Housing*, in THE STATE OF BLACK AMERICA 1989, at 77, 90-95 (1989) (pointing out that levels of black residential segregation remain high irrespective of education or income); George C. Galster, *Residential Segregation in American Cities: A Contrary Review*, 7 POPULATION RES. & POL’Y REV. 93, 95 (1988) (noting “a clear-cut consensus” in the research that “inter-racial differences in *income* (i.e., the affordability of housing) *alone* explain relatively little of the observed segregation”); Kain, *supra* note 13, at 450 (finding that “very little of the intense segregation of Afro-American households, or their serious underrepresentation in suburban areas, is explained by low incomes or other socioeconomic differences between them and majority households”).

16. See, e.g., Nancy A. Denton & Douglas S. Massey, *Residential Segregation of Blacks, Hispanics, and Asians by Socioeconomic Status and Generation*, 69 SOC. SCI. Q. 797, 807 (1988) (noting that Hispanics and Asians, unlike African Americans, have experienced decreases in residential segregation as their socioeconomic status has risen; indeed, residential segregation from whites remains higher among college-educated blacks than among Hispanics with zero-to-four years of education); John E. Farley, *Segregation in 1980: How Segregated Are America’s Metropolitan Areas?*, in DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION 95, 104-07 (Gary A. Tobin ed., 1987) [hereinafter DIVIDED NEIGHBORHOODS] (observing that Hispanics in general are significantly less segregated than blacks, and that Hispanic segregation levels have declined more over time).

17. See, e.g., Mittie Olion Chandler, *Obstacles to Housing Integration Program Efforts*, in THE METROPOLIS IN BLACK & WHITE: PLACE, POWER & POLARIZATION 286, 287 (George C. Galster & Edward W. Hill eds., 1992) [hereinafter BLACK & WHITE] (reporting a 1985 survey in Cleveland in which 65% of black respondents indicated that neighborhoods with an even distribution of blacks and whites were ideal); Joe T. Darden, *Choosing Neighbors and Neighborhoods: The Role of Race in Housing Preference*, in DIVIDED NEIGHBORHOODS, *supra* note 16, at 15, 26 (concluding that surveys of blacks “indicate a black preference for mixed or half-black half-white neighborhoods and the rejection of all black and all white ones”); Reynolds Farley et al., “Chocolate City, Vanilla Suburbs:” Will the Trend toward Racially Separate Communities Continue?, 7 SOC. SCI. RES. 319, 328-31 (1978) (reporting on a Detroit study that found a majority of blacks favor integrated neighborhoods).

nation perpetuated nationwide against African-American home seekers; and (2) widespread refusal by white home seekers to buy or rent in racially integrated communities. Strong evidence exists that America's housing sales and rental markets, and perhaps its mortgage lending markets as well, are rife with illegal discriminatory behavior.¹⁸ The Department of Housing and Urban Development (HUD) has sponsored two major studies of housing discrimination, completed in 1979 and 1989 respectively.¹⁹ The more recent HUD study found that African-Americans can expect to experience discrimination in fifty-nine percent of their home sales encounters and fifty-three percent of their leasing encounters.²⁰ This massive pattern of illegal conduct, which persists in defiance of federal statutes passed in 1968, has denied millions of black citizens access to municipalities and neighborhoods in which whites have invested their housing dollars.

Additionally, there is strong evidence that whites regularly decline to seek housing in communities where blacks currently reside or are likely to move in great numbers.²¹ While some whites doubtless do so because of racial prejudice, others claim that racial integration inevitably leads to a decline in property values and an increase in local taxation.²² Whether or not empirically correct,²³ such beliefs tend to become self-fulfilling prophecies, for when potential white home buyers shun communities that welcome integration, the market demand for housing in those communities, and *perforce*, the market value of those homes and apartments, tends to decline.²⁴

18. See, e.g., George C. Galster, *Racial Discrimination in Housing Markets During the 1980s: A Review of the Audit Evidence*, 9 J. PLAN. EDUC. & RES. 165 (1990) (reviewing over 70 housing discrimination studies, most of which found racial discrimination); Turner, *supra* note 9, at 201-10 (describing widespread discrimination against blacks and Hispanics by real estate sales and rental agents); Ronald E. Wienk, *Discrimination in Urban Credit Markets: What We Don't Know and Why We Don't Know It*, 3 HOUSING POL'Y DEBATE 217 (1992) (acknowledging the existence, though not the extent, of mortgage and other credit discrimination).

19. See MARGERY AUSTIN TURNER ET AL., HOUSING DISCRIMINATION STUDY: SYNTHESIS (1991); RONALD E. WIENK ET AL., MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY (1979).

20. TURNER, *supra* note 19, at vii.

21. Farley et al., *supra* note 17, at 336.

22. ANTHONY DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA 68-70 (1973) (cataloging eight principal white objections to residential integration, the first three of which are a likely rise in property taxes, a likely increase in federal taxes, and a fear of falling property values).

23. John Stahura, *Rapid Black Suburbanization of the 1970s: Some Policy Considerations*, 18 POL'Y STUD. J. 279, 288 (1989-1990) (analyzing 1980 Census data which suggest that black municipal population growth does not lead to tax increases and, in fact, has a positive effect on housing values).

24. See George C. Galster, *The Case for Racial Integration*, in BLACK & WHITE, *supra*

This socio-economic explanation of the segregative process is particularly sobering, for it implies that, even if every illegal act of discrimination could somehow be successfully interdicted, whites prompted by private market incentives would continue to make perfectly legal housing choices that, cumulatively, would lead to segregated neighborhoods. In a country firmly committed to private markets and to freedom of movement (for those with sufficient capital), no governmental remedy against segregation can ever succeed without sufficiently altering housing market forces to induce millions of blacks and whites with enough assets to exercise a range of housing choices to change their behavior and choose racially desegregated communities.²⁵

It is thus little wonder that many students of residential segregation, as noted above, concur in the gloomy belief that segregated living patterns are all but inevitable in the foreseeable future.²⁶ Not only do polit-

note 17, at 270, 278-79. Thomas Schelling's much-debated "tipping" model suggests that even if both whites and blacks are willing to live in racially integrated communities, eventual resegregation is inevitable so long as there are any systematic differences in the percentage of integration that whites and blacks will accept. Thomas Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATIC SOC'Y 143, 181-86 (1971). Although the assumptions of Schelling's model have been strongly challenged, see Galster, *supra* note 15, at 100-02, the real-world difficulties experienced by those communities that are committed to maintaining a multi-racial population suggest that some variant of Schelling's phenomenon may be at work in many communities that undergo racial transition. See, e.g., Alexander Polikoff, *Sustainable Integration or Inevitable Resegregation*, in HOUSING DESEGREGATION AND FEDERAL POLICY 43, 43-56 (John M. Goering ed., 1986) (describing problems with racial stabilization programs); Chandler, *supra* note 17, at 291-302 (same).

25. See Sander, *supra* note 14, at 902-03.

26. Anthony Downs' 1973 classic, *Opening Up the Suburbs*, remains the most powerful argument for residential desegregation. Recently, as the twentieth anniversary of his work approached, Downs observed:

I am skeptical that truly equal racial housing outcomes can be achieved as long as residential areas remain segregated by race. Nevertheless, the obvious, persistent, and widespread white antipathy to racial residential integration makes it unlikely that this condition will be attained on any really large scale in my lifetime.

Anthony Downs, *Policy Directions Concerning Racial Discrimination in U.S. Housing Markets*, 3 HOUSING POL'Y DEBATE 685, 688 n.1 (1992) [hereinafter Downs, *Policy Directions*].

John Goering also remarked:

It is appalling how little is known, how little has been effective, and how mountainous are the obstacles to change. The costs of segregation are so severe, and the pace of change so dreadfully slow, that one can despair of any progress within the next decades. . . . I suspect that progress will occur only in small steps and that watershed victories are unlikely.

John Goering, *Concluding Remarks*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 24, at 327, 333; see also Gary A. Tobin, *Introduction: Housing Segregation in the 1980s*, in DIVIDED NEIGHBORHOODS, *supra* note 16, at 8, 14 (voicing a similar expectation); John Yinger, *On the Possibility of Achieving Racial Integration Through Subsidized Housing*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 24, at 290, 306-07 (same).

ical forces seem aligned against effective reform,²⁷ but even the law appears relatively powerless to combat residential segregation directly, because of our commitment to private choice in housing markets. Thus, Anthony Downs notes:

[R]esidential segregation by race can and does arise because of factors that are not illegal, but voluntary (though illegal behavior may contribute to it). Such segregation is relatively easy to detect, but it cannot be attacked *per se*, as can racially discriminatory behavior. Such segregation arises because of the collective results of many individual actions that are not illegal and, hence cannot be directly discouraged through fines and punishment. Moreover, public support for antisegregation actions is not nearly as strong or widespread as public support for antidiscrimination actions. . . .

*This analysis indicates that policies designed to reduce residential segregation by race are not likely to be nearly as effective in achieving their goal—at least in the near future—as those designed to reduce racially discriminatory behavior in housing market transactions.*²⁸

Downs' analysis leads him and other commentators to advocate more of the same—vigorous enforcement of fair housing laws, hoping somehow to deter market actors from actively discriminating against minority citizens who seek integrated housing opportunities.²⁹

27. Anthony Downs made the point quite bluntly:

[T]he white-dominated U.S. society has clearly chosen to create and maintain two racially separate and unequal societies, as the Kerner Commission feared it might. In spite of all pious statements to the contrary, the leaders and citizens of nearly all parts of U.S. society have no intention whatever of changing that deliberate policy. . . .

....

If this conclusion is correct, there is no point in advocating racial integration as the central social strategy for coping with big-city problems. . . . This is the best approach in theory, and perhaps marginal progress can be made in pursuing it. But the political leaders of all large metropolitan areas do not have the slightest interest in pursuing this strategy in any meaningful way. This is true both of most white leaders, who want to maintain their basically segregated neighborhoods, and most black leaders, who want to preserve the political power that comes from concentrating minorities within the central city.

Downs, *supra* note 5, at 289-90.

28. Downs, *Policy Directions*, *supra* note 26, at 725.

29. *Id.* at 739-42. Downs is joined in this emphasis by George Galster, who has urged a redirection of fair housing toward "collective modes of enforcement," including more aggressive and well-funded "testing" to be conducted by public agencies and fair housing organizations. GEORGE C. GALSTER, *FEDERAL FAIR HOUSING POLICY IN THE 1980s: THE GREAT MISAPPREHENSION* 17-23 (MIT Center for Real Estate Development Working Paper No. HP-5, 1988).

The National Fair Share proposal aims to accomplish what Downs says cannot be done: to "attack segregation *per se*."³⁰ While it neither outlaws segregation entirely nor dictates private housing choices, it does place on local municipalities an affirmative burden to end segregation. It also imposes sharp economic costs on residents of municipalities that do not comply, thereby changing the economic calculus for potential renters and home buyers. This proposal is not modest in scope, for it requires combined action by the federal government, each of the states, and thousands of municipalities. Nor is it cost-free. The federal government would be required to increase its national investment in subsidized housing, which has dwindled under the Reagan and Bush Administrations, and it also would be required to provide funds for planning and technical assistance to the states. Yet at bottom, the Act eschews a massive, federal housing production program in favor of a more manageable redirection of the nation's ongoing residential growth in directions that eventually should bridge the racial chasm that currently divides us. Moreover, the Act borrows key elements from proven legislative strategies that have succeeded in implementing civil rights goals in other contexts.

II. ELEMENTS OF A SUCCESSFUL RACIAL STRATEGY

A. *The Deficiency of a Case-by-Case Approach*

The Fair Housing Act of 1968³¹ is the principal federal statute designed to combat residential discrimination.³² Enacted in the wake of

30. An effective legal response cannot rely directly on constitutional remedies. The Supreme Court has repeatedly held that private choices leading to segregated residential communities, if not the product of government action, do not directly violate the Equal Protection Clause of the Fourth Amendment, requiring judicial intervention.

Where resegregation [of public schools] is a product not of state action but of private [residential] choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. . . . Residential housing choices . . . present an ever-changing pattern, one difficult to address through judicial remedies.

Freeman v. Pitts, 112 S. Ct. 1430, 1448 (1992).

Congress nonetheless has broad authority under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to legislate against racial ills. *See, e.g.,* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (upholding the power of Congress under 42 U.S.C. § 1982 to outlaw private acts of racial discrimination in the sale or leasing of real property); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (upholding a provision of the Voting Rights Act of 1965 that barred New York's imposition of an English literacy requirement on Spanish-speaking voters in a state election).

31. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988 & Supp. II 1990)).

32. Several other federal statutes, most notably the Housing and Community Develop-

the *Kerner Commission Report* and the assassination of Dr. Martin Luther King, Jr. in 1968,³³ the Act prohibits acts of racial (or religious) discrimination by governmental and most private actors in the sale or

ment Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. §§ 5301-5320 (1988 & Supp. II 1990)), profess to aim at "the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income." 42 U.S.C. § 5301(c)(6) (1988). As originally enacted, the Housing and Community Development Act required localities to develop three-year comprehensive plans to meet community development needs, as well as "Housing Assistance Plans" (HAPs) to assess the present and future housing needs of lower-income persons and to specify how the municipalities intended to meet their housing needs. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 104(a)(1)-(4), 88 Stat. 633, 638 (amended by Housing and Community Development Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 384, 384 (codified as amended at 42 U.S.C. § 5304(a) (1988))). HAPs were to be reviewed and certified by regional and state planning clearinghouses following an "A-95 review" process. *Id.* The failure to receive certification of a HAP theoretically precluded a municipality from receipt of its share of the \$8.3 billion in Community Development Block Grants (CDBGs) authorized under the Act. *Id.* §§ 104(a), (e), 88 Stat. at 638, 640. See generally Duane P. Landreth, *Four Elements—Planning, Citizen Participation, Housing Assistance and A-95 Review—Under Title I of the Housing and Community Development Act of 1974*, 9 URB. LAW. 61 (1977) (describing the Act's operation and its predecessor programs).

Yet the text of the Housing and Community Development Act does not speak in express racial terms, and the Act provides several avenues by which suburban municipalities can avoid participation in the federal effort to "spatially deconcentrate" low-income and minority housing. See 42 U.S.C. § 1439(c) (1988) (requiring HUD to notify a municipality and allow 30 days for expression of local disapproval before federally assisted housing can be placed in a community). In addition, the 1974 Act contained only a vague general requirement that applicants for CDBG funds give "maximum feasible priority" to activities that would benefit low- or moderate-income families or aid in the elimination of slums or blight. Pub. L. No. 93-383, § 104(b)(2), 88 Stat. 633, 639 (amended by Housing and Community Development Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 384, 384 (codified as amended at 42 U.S.C. § 5304(a) (1988))). In fact, HUD is directed to approve all applications for CDBG funds unless either the applicant's self-description of its needs and objectives appears "plainly inconsistent" with available data, *id.* § 104(c)(1), 88 Stat. at 639, or unless the applicant's plan for use of CDBG funds is "plainly inappropriate" in light of HUD's plan. *Id.* § 104(c)(2), 88 Stat. at 639. As if to make the point more clearly, the Act stated its intention to provide community funds "on an annual basis, with maximum certainty and minimum delay." *Id.* § 101(d)(1), 88 Stat. at 635.

Many commentators have judged the implementation of the Act a failure, arguing that HUD's enforcement has betrayed whatever strict emphasis on assisting low-income citizens or achieving racial desegregation that may have been contemplated originally by Congress. Calmore, *supra* note 15, at 87; John O. Calmore, *Fair Housing vs. Fair Housing: The Problems with Providing Increased Housing Opportunities Through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7, 10-12 (1980); Mittie Olion Chandler, *Public Housing Desegregation: What Are the Options?*, 3 HOUSING POL'Y DEBATE 509, 522 (1992); Herbert Franklin et al., *Inclusionary Programs and the Larger Public Interest*, in AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING 299, 301 (Jerome G. Rose & Robert E. Rothman eds., 1977) [hereinafter AFTER MOUNT LAUREL]; Kushner, *supra* note 1, at 589-90 & nn.95-97.

33. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 160 (1969).

rental of multi-family dwellings.³⁴ The Fair Housing Act also requires HUD and other federal agencies to "administer their programs and activities relating to housing and urban development . . . affirmatively to further the purposes of" fair housing.³⁵

By most accounts, the Fair Housing Act has been a disappointing failure.³⁶ Until 1988, when substantial legislative revisions were adopted,³⁷ the Act provided injured parties only trivial economic incentives to initiate corrective lawsuits.³⁸ Moreover, federal authorities were given very limited authority to pursue independent federal enforcement efforts.³⁹ Although the 1988 amendments to the Fair Housing Act have

34. 42 U.S.C. § 3604(a) & (b) (1988). The Act also prohibits discrimination in the advertisement, financing, or commercial brokerage of housing units. *Id.* §§ 3604(c), 3605-3606.

35. *Id.* § 3608(d).

36. See, e.g., GALSTER, *supra* note 29, at 14-17; James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348, 351-55 (1988); see also H.R. REP. NO. 711, 100th Cong., 2d Sess. 13-17 (1988), reprinted in 1988 U.S.C.A.N. 2173, 2174-78 ("Twenty years after the passage of the Fair Housing Act, discrimination and segregation in housing continue to be pervasive.").

37. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3602-3608, 3615-3619, 3631 (1988) and 28 U.S.C. § 2341-2342 (1988)); see James A. Kushner, *Federal Enforcement and Judicial Review of the Fair Housing Amendments Act of 1988*, 3 HOUSING POL'Y DEBATE 537, 548-59 (1992).

38. Prior to 1988, the Fair Housing Act limited successful parties to the recovery of their actual damages and a maximum of \$1000 in punitive damages. Pub. L. No. 90-284, § 812(c), 82 Stat. 73, 88 (amended by Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3602-3608, 3615-3619, 3631 (1988) and 28 U.S.C. § 2341-2342 (1988))). Since the principal damages in such cases are often dignitary injuries, not out-of-pocket losses, this provision served as a severe financial disincentive to parties trying to decide whether to undergo the expense and uncertainties of litigation. Moreover, even though Title VIII cases often are difficult to litigate and large recoveries are rare, the statute provided that attorneys fees would be awarded only to those prevailing parties who could demonstrate that they were "not financially able to assume said attorney's fees." *Id.* The pre-litigation conciliation provisions of the 1968 Act, *id.* §§ 810(d), 812(a), 88 Stat. 86, 88, were often ineffective as well. Professor Kushner reports that, in 1988, of the 4658 housing discrimination complaints filed with HUD, only 214 were conciliated successfully by HUD itself, with another 908 conciliations achieved by state and local fair housing authorities, for a total of only 1123 successful conciliations out of 4658 original complaints filed with HUD. Kushner, *supra* note 37, at 538 n.7.

Aggrieved parties theoretically have available another legal remedy under 42 U.S.C. § 1982 (1988), a surviving remnant of the Civil Rights Act of 1866 which allows the recovery of attorneys' fees and punitive damages. However, success under § 1982 requires proof of the defendant's intent to discriminate, often a difficult burden to meet.

39. Apart from conciliation responsibilities under §§ 808-810, the 1968 Act gave HUD independent enforcement powers only if HUD found "reasonable cause to believe that any person . . . is engaged in a pattern or practice of resistance," and only if "such denial raise[d] an issue of general public importance." Pub. L. No. 90-284, § 813(a), 82 Stat. 73, 78 (amended by Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3602-3608, 3615-3619, 3631 (1988) and 28 U.S.C. § 2341-2342 (1988))).

addressed many of these deficiencies,⁴⁰ other problems remain or have arisen.⁴¹

More centrally, the Fair Housing Act retains an inherent flaw: It is built upon a tort or criminal liability model that requires the identification of a violation, the detection of a perpetrator, and proof at trial that the perpetrator's act has violated the federal housing statutes.⁴² Yet, realtors, lenders, or sellers rarely reveal their intent to discriminate, and most injured parties remain unaware that the law has been violated.⁴³ Various steps could (and should) be taken to improve the efficacy of the Fair Housing Act—aggressive use of “testing” or housing audit methods to detect misconduct,⁴⁴ more vigorous enforcement by federal authorities armed with a larger enforcement budget,⁴⁵ and increased financial assist-

40. James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1087-92 (1989). The 1988 Amendments have lifted the cap on punitive damages, 42 U.S.C. § 3613(c)(1) (1988), and made attorneys' fees more readily available. *Id.* § 3613(c)(2). The Amendment now contemplates the option of court-appointed attorneys for plaintiffs in their litigation against offenders under the Act. *Id.* § 3613(b)(1).

41. Professor Kushner reports that, by broadening the scope of the Fair Housing Act in 1988 to forbid discrimination based on sex or familial status, Congress provoked a flood of non-race-based housing claims that now swamp the HUD resources previously available for the investigation of claims of racial discrimination. Kushner, *supra* note 37, at 565-66.

42. Gary Orfield, *The Movement for Housing Integration, in HOUSING DESEGREGATION AND FEDERAL POLICY*, *supra* note 24, at 18, 24-25. Most lower federal courts have permitted recovery under the Fair Housing Act without proof that a defendant acted with discriminatory intent or motive, so long as a plaintiff has demonstrated that a defendant's actions have had a discriminatory impact or effect. *See, e.g.,* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-37 (2d Cir.), *review declined in part and judgment aff'd*, 488 U.S. 15 (1988) (*per curiam*); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986-88 (4th Cir. 1984). The Seventh Circuit has established a four-factor test for Title VIII liability; while proof of discriminatory intent is one of those factors, it is the “least important,” and not all four are necessary to establish a Title VIII violation. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290-92 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). *But see* *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1115-16 (D.D.C. 1987) (holding that some allegation of discriminatory intent is necessary to prevail against private defendants, although proof of discriminatory impact or effect will suffice in actions against governmental defendants).

43. Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 379-80 (1988). Discrimination can occur at any of multiple stages in the process that leads to a real estate purchase or lease. *See* Turner, *supra* note 9, at 189-91 (detailing the steps at which housing discrimination may occur). It is especially difficult to detect methods of housing discrimination that involve the withholding of information about the full range of housing options. Darden, *supra* note 17, at 8.

44. GALSTER, *supra* note 29, at 17-18.

45. *See, e.g.,* Kushner, *supra* note 37, at 585-86; John Yinger, *The Racial Dimension of Urban Housing Markets in the 1980s, in DIVIDED NEIGHBORHOODS*, *supra* note 16, at 43, 63-64. For an interesting account of the possibilities, and the inevitable limitations, of a vigorous federal enforcement campaign, see Joel L. Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement*, 17 U.C. DA-

ance to the nationwide network of private fair housing organizations.⁴⁶ Still, none of these steps, even viewed collectively, seems likely to detect or deter the more than two million estimated acts of housing discrimination committed every year. They seem even less likely to counter the powerful economic incentives that prompt this illegal behavior.⁴⁷

B. *The Efficacy of Systemic Approaches*

Widespread violations of civil rights laws are nothing new, and experience has shown that effective compliance strategies cannot rely upon the punishment of individual acts of misconduct. Instead they require the design of affirmative, system-wide remedies.⁴⁸ The fifty-year battle in the South to enforce the Fifteenth Amendment against the disenfranchisement of black citizens offers a useful example.⁴⁹ Each legal step forward in the campaign to assure African Americans the vote was met by official and private resistance no less determined than that which today confronts the proponents of residential desegregation—a veritable dance of sallies, side-steps, and false assurance with very little measurable

VIS L. REV. 445, 475-504 (1984) (describing a special two-year initiative to enforce the Fair Housing Act undertaken by the United States Department of Justice during the latter years of the Carter Administration).

46. Roderic V.O. Boggs et al., *Use of Testing in Civil Rights Enforcement*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 317, 340 (Michael Fix & Raymond J. Struyk eds., 1992) (urging the establishment and funding of a national center to provide training and coordination on audit methods); Downs, *Policy Directions*, *supra* note 26, at 739-40 (same).

47. George Galster, pointing to some successes reported in Cleveland Heights, Ohio, and in Kentucky, has argued from the limited evidence available that aggressive use of audit methods "can create a potent deterrent." GALSTER, *supra* note 29, at 18.

Yet a supply-side housing discrimination strategy founded upon interdiction and deterrence—largely directed against the "suppliers" of the illegal product—may have little greater success than the similar policy approach adopted in the nation's campaign against the sale of illegal drugs. In that arena, neither a sharp increase in criminal penalties levied against convicted suppliers of drugs nor an increased financial commitment to federal and state drug law enforcement has proved successful. Many authorities now concede that, unless consumer demand for the illegal product is reduced, the success of an interdiction effort is unlikely. John J. DiIulio, Jr., *Crime*, in SETTING DOMESTIC PRIORITIES: WHAT CAN GOVERNMENT DO? 101, 125-27 (Henry J. Aaron & Charles L. Schultze eds., 1992) (noting that major, costly law enforcement efforts to identify and incarcerate drug dealers in New York and Florida have done almost nothing to diminish drug traffic).

While this Essay concurs in the call for expanded use of fair housing audit methods and for more aggressive federal and state action against housing discrimination, it nonetheless argues that a "demand-side deterrent" like that proposed in the remainder of this Essay has greater potential to achieve the goals of the fair housing laws.

48. William L. Taylor makes this argument effectively in his article, William Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1717-25 (1986).

49. See DERRICK BELL, RACE, RACISM, & AMERICAN LAW §§ 4.4-4.7, at 190-212 (3d ed. 1992) (chronicling the campaign for enfranchisement).

progress toward genuine enfranchisement.⁵⁰ Only when Congress passed the Voting Rights Act of 1965⁵¹ did blacks begin to register to vote in great numbers.⁵²

The structure of this extremely successful act merits consideration. The Voting Rights Act self-consciously abandoned a case-by-case search for identifiable misconduct in favor of a wholesale suspension of state voting "tests or devices," such as literacy tests, character tests, etc.,⁵³ in every jurisdiction where noncompliance was deemed likely.⁵⁴ In those

50. The Supreme Court emphasized the ineffectiveness of earlier, moderate legislative remedies in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), which upheld the more radical legislative solution embodied in the Voting Rights Act of 1965:

In recent years, Congress has repeatedly tried to cope with the problem [of voting discrimination] by facilitating case-by-case litigation

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem

The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent . . . in preparation for trial. . . . Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.

Id. at 313-14; *see, e.g.*, *Louisiana v. United States*, 380 U.S. 145, 151-56 (1965) (enjoining Louisiana's use of a subjective "interpretation" test for voting which had allowed local registrars to deny the ballot to black applicants deemed unable to interpret state or federal constitutional provisions adequately); *United States v. Mississippi*, 380 U.S. 128, 143-44 (1965) (reviewing a 75-year legal campaign by Mississippi officials to deny African Americans the franchise); *Terry v. Adams*, 345 U.S. 461, 469-70 (1953) (striking the exclusion of blacks from membership in a Texas "pre-primary, Jaybird Democratic Association," whose nominees regularly won all Democratic Party nominations); *Lane v. Wilson*, 307 U.S. 268, 275-77 (1939) (striking Oklahoma law granting "non-grandfathered" voters only 12 days to register to vote or be perpetually disenfranchised); *Nixon v. Condon*, 286 U.S. 73, 88-89 (1932) (striking Texas law that allowed Democratic State Executive Committee to prohibit blacks from participating in Democratic Party primary elections); *Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927) (striking Texas law barring African Americans from participating in Democratic Party primary election); *Guinn v. United States*, 238 U.S. 347, 361-68 (1915) (striking a "grandfather" clause in Oklahoma's constitution, which nominally imposed a literacy requirement on all Oklahoma voters while exempting those (the white majority) whose ancestors had been entitled to vote on January 1, 1866).

51. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973b(b) (1988)).

52. *See* Cynthia Wright, Comment, *The Effects of Sections 2 and 5 of the Voting Rights Act on Minority Voting Practices*, 28 How. L.J. 589, 592 (1985) (noting that over one million blacks registered to vote between 1965 and 1972); *id.* at 600 (reporting that black voter registration doubled between 1960 and 1980 in eleven Southern states, with almost two million blacks added to registration rolls by 1975).

53. 42 U.S.C. § 1973b(c) (1988).

54. The Act was designed to apply to every district that used a "voting test or device" where fewer than 50% of eligible voters had registered to vote in that district as of November 1, 1964, or where fewer than 50% of those registered had actually voted in the 1964 presidential election. *Id.* Together, these criteria targeted the Southern states and a few random juris-

jurisdictions, without further proof of fault, the Act delegated to the federal Department of Justice broad remedial powers to appoint federal voting registrars who would supplement (if not replace) local registrars.⁵⁵ The Act made illegal not only voting devices that had been enacted "for the purpose" of abridging the voting rights of racial minorities, but also all devices that, in practice, had such an impact or effect.⁵⁶ Finally, the Act authorized the Department of Justice to "preclear" every proposed change in local voting procedures in the affected jurisdictions to intercept and forestall any changes that would violate the ends of the Act.⁵⁷

A similar congressionally initiated change of strategy proved necessary to end school segregation in the face of determined Southern resistance. The Supreme Court's unanimous decisions in *Brown v. Board of Education*⁵⁸ declared that *de jure* public school segregation violated the Fourteenth Amendment and ordered desegregation "with all deliberate speed."⁵⁹ Yet the Court's mandate yielded little actual desegregation during the decade that followed, despite hundreds of lawsuits brought to compel compliance.⁶⁰ The breakthrough came only with the Civil Rights Act of 1964,⁶¹ which finally bestowed authority on the Department of Health, Education and Welfare (HEW) to issue administrative guidelines demanding measurable desegregation.⁶² The subsequent HEW regulations required every formerly *de jure* school district that hoped to receive

dictions in other parts of the country. See H.R. REP. NO. 439, 89th Cong., 1st Sess. 13-16 (1965), reprinted in 1965 U.S.C.A.N. 2437, 2444-45.

55. 42 U.S.C. § 1973(d), (e) (1988). The Act does grant a narrow "escape clause" to a state or jurisdiction able to demonstrate that incidents of racial discrimination in the application of its tests or device are "few in number and have been promptly and effectively corrected," if it can also prove that "the continuing effect of such incidents has been eliminated" with "no reasonable probability of their recurrence in the future." *Id.* § 1973a(a).

56. *Id.* § 1973a(b).

57. *Id.* § 1973c.

58. *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (*Brown I*).

59. *Brown II*, 349 U.S. at 301.

60. By 1964, a decade after *Brown*, only 2% of all black children in the South were attending desegregated public schools. NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 75 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989); see *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 853-56, 860-61 (5th Cir. 1966) (summarizing judicial efforts), modified *per curiam en banc*, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967).

61. Pub. L. No. 88-352, §§ 401, 601-02, 78 Stat. 246, 252-53 (1964) (codified as amended at 42 U.S.C. § 2000c & 2000d-1(1988)).

62. Congress declared in Title VI of the Civil Rights Act of 1964 that "[n]o person . . . may be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1988). Congress empowered the Department of Education, among other federal departments, to issue rules and regulations to enforce the prohibitions of § 2000d. *Id.* § 2000d-1.

federal aid to education either to submit an effective desegregation plan for certification by HEW or to demonstrate that it was operating under a valid judicial decree requiring school desegregation.⁶³

To provide an economic incentive for compliance, Congress soon enacted the Elementary and Secondary Education Act of 1965,⁶⁴ which appropriated very substantial educational grants to states that chose to comply with federal civil rights statutes.⁶⁵ By delegating to HEW the authority both to prescribe Title VI regulations and to withhold appropriations from school boards whose plans were judged inadequate, Congress created extremely powerful tools to demand meaningful public school desegregation throughout the South. Once these remedial tools had been forged, progress toward desegregation was remarkable.⁶⁶

Likewise, widespread racial desegregation in private employment came only after Congress empowered an administrative agency, the Equal Employment Opportunity Commission (EEOC), to investigate

63. 34 C.F.R. § 100.1-100.13 (1992). The HEW regulations included detailed guidelines spelling out the administrative steps necessary to bring a school district into compliance with Title VI. *Id.* § 100.4(a)-(c). See *Green v. County Sch. Bd.*, 391 U.S. 430, 433-34 n.2 (1968) (describing the promulgation of HEW guidelines).

Subsequently, Judge John Minor Wisdom announced that the Fifth Circuit would abandon case-by-case adjudication of school desegregation plans in favor of a sweeping decree applicable to school districts throughout the circuit that drew heavily upon HEW desegregation guidelines. *Jefferson County*, 372 F.2d at 847-48, 886-96.

Judge Wisdom reviewed the history of widespread delay in implementing the mandate of *Brown*, and emphasized the congressional intent (evident in the Civil Rights Act of 1964) to speed the implementation process. He then announced that federal courts should henceforth focus upon demonstrable results, not upon evidence that school boards were acting in good faith: "*The only school desegregation plan that meets constitutional standards is one that works.*" *Id.* at 847.

The following year the Supreme Court adopted a similar approach, imposing on each southern school board the responsibility not merely to demonstrate that its desegregation plan had been drawn in good faith, but to establish "that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation." *Green*, 391 U.S. at 439. The Supreme Court held that the desegregation plan at issue in *Green*, which afforded students throughout the school district complete freedom of choice in the selection of a public school, was constitutionally "unacceptable" because it had not yielded meaningful desegregation throughout the system. *Id.* at 440-41.

64. Pub. L. No. 89-10, 70 Stat. 27 (codified as amended at 20 U.S.C. §§ 236-246 (1988)).

65. The Senate Report that accompanied the Act indicated an intention to provide \$1.06 billion to local school districts for educational assistance to disadvantaged children. S. REP. NO. 146, 89th Cong., 1st Sess. 5-6 (1965), reprinted in 1965 U.S.C.C.A.N. 1450-51.

66. See GARY ORFIELD, PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980, at 5 (1983) (reporting that the percentage of southern black children in all-black schools dropped from 98% in 1963 to 25% in 1968 as a result of enforcement of the Civil Rights Act of 1964 by HEW and the federal courts); *id.* at 4, tbl. 2 (reporting that the percentage of black children in "predominantly minority" schools in the South declined from 80.9% in 1968 to 57.1% in 1980).

and remedy charges of unlawful employment discrimination⁶⁷ and to issue regulations to enforce Title VII of the Civil Rights Act of 1964.⁶⁸ The EEOC⁶⁹ and ultimately the Supreme Court⁷⁰ then interpreted Title VII to prohibit not only individual acts of discrimination,⁷¹ but also the use of employment criteria that led to underrepresentation of blacks in an employer's work force, unless those criteria could be shown to be required as a matter of business necessity.⁷² Moreover, both the EEOC⁷³ and, ultimately, the Supreme Court,⁷⁴ read Title VII's remedial powers broadly to approve affirmative, race-conscious hiring and/or promotional goals and timetables which prescribe a specific number of minority workers to be hired or promoted within a fixed time as a remedy for past discrimination.⁷⁵ The effect of Title VII on the composition of the Amer-

67. 42 U.S.C. § 2000e-5 (1988).

68. *Id.* §§ 2000e-4 to -12.

69. See 29 C.F.R. § 1607.3, 35 Fed. Reg. 12333 (Aug. 1, 1970) ("The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race . . . will be considered to be discriminatory . . . unless the procedure has been validated in accordance with these guidelines.").

70. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

71. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-06 (1973) (prescribing burdens of production and proof in "disparate treatment" cases).

72. In *Griggs*, a "disparate impact" case, the Supreme Court interpreted Title VII to invalidate the Duke Power Company's use of intelligence tests or a high school graduation requirement as employment criteria. Both policies had a sharply adverse impact on potential black employees and were held improper, absent proof by the employer that "the high school completion requirement . . . [or] the general intelligence test . . . bear[s] a demonstrable relationship to successful performance of the jobs for which it was used." *Griggs*, 401 U.S. at 431. The Court reasoned: "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.*

73. See EEOC's Guidelines on Affirmative Action, 44 Fed. Reg. 4422 (1979) (codified at 29 C.F.R. §§ 1608.1-12 (1992)).

74. In *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*, 478 U.S. 421 (1986), the Court held that a district court, as a remedy for violations of Title VII, may order an employer to engage in preferential hiring or promotion of African Americans who were not themselves the identifiable victims of the employers' previous acts of discrimination. *Id.* at 482-83.

75. Affirmative action plans have generated intense scholarly and judicial controversy, because they place in conflict two important goals: The remediation of prior acts of discrimination that have denied equal employment opportunities to African Americans, and the constitutional desire to treat all persons without regard to their race. A deeply divided majority of the Court suggested in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), that an employer could not justify the lay-off of more senior, non-minority teachers while retaining less senior, minority teachers, solely to overcome prior societal discrimination against minorities absent a court determination that the defendant employer had engaged in specific acts of discrimination against identifiable victims. *Id.* at 274-76.

The Supreme Court nonetheless has recognized broad power in Congress under § 5 of the Fourteenth Amendment to enact race-conscious federal legislation to overcome the effects of

ican work force has been significant.⁷⁶

The cumulative lesson of the voting, public education, and employment statutes is that serious civil rights remedies should: (1) rely upon objective, system-wide goals; (2) demand concrete progress toward those goals from the chief institutional actors who implement them; and (3) offer powerful financial incentives, both positive and negative, to promote compliance.

C. Lessons From the "Fair Share" Approach

No federal housing statute has ever had notable success in combating residential segregation, because none, certainly neither the Fair Housing Act of 1968 nor the Housing and Community Development Act of 1974, was ever designed to demand system-wide results. One such housing strategy has emerged in the states, however:⁷⁷ the "fair share" statutes associated most prominently with New Jersey's *Mount Laurel* decisions⁷⁸ and its 1985 Fair Housing Act.⁷⁹

The New Jersey approach was prompted by a decade-long litigation effort, originally filed on behalf of poor and minority citizens, to challenge the exclusionary zoning laws of Mount Laurel, New Jersey, a suburban municipality with zoning laws that effectively barred construction of low-income, multi-family housing.⁸⁰ Although the lawsuit alleged

past societal discrimination against African Americans. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 483-87 (1980); cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486-91 (1989) (invalidating a municipal minority business set-aside program because it was not justified by clear evidence of past discrimination by the city that would warrant "race-based relief").

76. Taylor, *supra* note 48, at 1712-13 (noting several studies that have documented the positive effects of Title VII on minority employment opportunities).

77. See generally DAVID LISTOKIN, *FAIR SHARE HOUSING ALLOCATION* (1976) (discussing fair share housing objectives, strategies, and examples).

78. *South Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (*Mount Laurel I*), cert. denied and appeal dismissed, 423 U.S. 808 (1975); *South Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel II*). Some commentators have described *Hills Development Co. v. Township of Bernards*, 103 N.J. 1, 21, 510 A.2d 621, 634 (1986), in which the New Jersey Supreme Court upheld the constitutionality of the New Jersey Fair Housing Act of 1985 as "*Mount Laurel III*." See, e.g., Harold McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 623 (1987). As John M. Payne explained in another context: "'Mount Laurel' is both an idea and a case. The idea is . . . that land development is a quasi-public utility and should be regulated in the public interest." John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20, 44 (1987).

79. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 1992).

80. See generally AFTER MOUNT LAUREL, *supra* note 32 (containing a series of essays discussing *Mount Laurel*); Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186 (1991); Daniel E. Chall, *Housing Reform in New Jersey: The Mount Laurel Decision*, 10 FED. RESERVE BK. OF N.Y. Q. REV.

that Mount Laurel's zoning laws were racially motivated,⁸¹ the New Jersey Supreme Court ultimately declined to resolve that issue,⁸² instead adopting a different doctrinal approach. The court held that New Jersey's state zoning enabling laws, which empower its local municipalities to promulgate zoning ordinances,⁸³ were subject to New Jersey's general constitutional imperative to legislate only "for the general welfare." Any zoning ordinance that denied reasonable housing opportunities to a "fair share" of a region's low- and moderate-income citizens, the Court reasoned, contravened both the enabling statute and New Jersey's constitutional requirements.⁸⁴

19 (1985-86); Mark A. Hughes & Peter M. VanDoren, *Social Policy through Land Reform: New Jersey's Mount Laurel Controversy*, 105 POL. SCI. Q. 97 (1990); James A. Kushner, *Land Use Litigation and Low Income Housing: Mandating Regional Fair Share Plans*, 9 CLEARINGHOUSE 10 (1975); Martha Lamar et al., *Mount Laurel At Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197 (1989); Harold A. McDougall, *Mount Laurel II And The Revitalizing City*, 15 RUTGERS L. J. 667 (1984) [hereinafter McDougall, *Revitalizing City*]; McDougall, *supra* note 78; Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMPLE L.Q. 665 (1987) [hereinafter McDougall, *Regional Contribution*]; John M. Payne, *From the Courts*, 20 REAL EST. L.J. 75 (1991) [hereinafter Payne, *From the Courts*]; Payne, *supra* note 78; John M. Payne, *Housing Rights and Remedies: A "Legislative" History of Mount Laurel II*, 14 SETON HALL L. REV. 889 (1984); Jerome G. Rose, *New Jersey Enacts a Fair Housing Law*, 14 REAL EST. L.J. 195 (1985); Norman Williams, Jr., *The Background and Significance of Mount Laurel II*, 26 J. URB. & CONTEMP. L. 3 (1984); Michael A. Stegman, *A Review of Production under New Jersey's Mount Laurel Inclusionary Housing Process: A Comparison of States and Localities* (Robert W. Burchell ed., Oct. 1, 1990) (unpublished draft in Affordable Housing Paper Series, available from New Jersey Council on Affordable Housing).

81. See John M. Payne, *Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?*, 6 YALE L. & POL'Y REV. 361-62 (1988); Williams, *supra* note 80, at 8.

82. "[W]e accept the representation of the municipality's counsel at oral argument that the regulatory scheme was not adopted with any desire or intent to exclude prospective residents on the obviously illegal basis of race, origin or believed social incompatibility." *Mount Laurel I*, 67 N.J. at 159, 336 A.2d at 717.

83. Act of April 3, 1928, ch. 274, 1928 N.J. Laws 696 (zoning enabling statute) (repealed by Act of Jan. 14, 1976, ch. 291, 1976 N.J. Laws 1107).

84. The New Jersey Supreme Court reasoned:

[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.

Mount Laurel I, 67 N.J. at 177, 336 A.2d at 726.

It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further, the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its

Mount Laurel radically reinterpreted traditional zoning concepts⁸⁵ by conditioning the legality of municipal zoning ordinances upon their consideration of regional and statewide housing needs.⁸⁶ Indeed, many perceived *Mount Laurel* as a decision that would allow New Jersey's urban poor some meaningful access to the state's growing suburban areas.⁸⁷ Predictably, the decision provoked widespread criticism and substantial resistance.⁸⁸ Furthermore, because the decision was content to announce a new right without specifying effective, complementary remedies—indeed, without even offering clarity on its key terms⁸⁹—it became the ob-

land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.

Id. at 179, 336 A.2d at 727-28.

85. See Kushner, *supra* note 80, at 10 ("The carefully reasoned and innovative opinion may . . . prove to be the Magna Carta of suburban low and moderate income housing opportunity."); Williams, *supra* note 80, at 8 ("*Mount Laurel I* . . . [is] [c]learly the most important zoning opinion since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)").

86. Professor Harold McDougall has summarized the change in concept:

In *Mount Laurel I*, each municipality had pursued a zoning course that effectively screened out the nuisance costs, congestion costs, and fiscal costs of regional development, as well as the presence of persons antithetical to the social and educational milieu of the incumbent residents. Although the municipalities were not purposefully acting in concert to exclude low and moderate income people, their collective conduct had that result. . . .

The *Mount Laurel I* court addressed the problem by shifting power over the locational choices of low and moderate income people from the municipal to the state level. The court determined that statutory provisions requiring the protection of "regional general welfare" obligated each developing municipality to provide its fair share of low and moderate income housing. In particular, the Court held that the Standard Zoning Enabling Act imposed an obligation on municipalities to zone for the welfare of all the state's people, not merely for local residents.

McDougall, *Regional Contribution*, *supra* note 80, at 672-73.

87. See, e.g., Jerome G. Rose, *Is There a Fair Share Housing Allocation Plan That Is Acceptable to Suburban Municipalities?*, in *AFTER MOUNT LAUREL*, *supra* note 32, at 114, 116 (observing that "it should be clear that the purpose of a fair share housing allocation plan is to provide an opportunity for low and moderate-income families to escape from the older central cities to the newer developing suburbs"); Kushner, *supra* note 80, at 12 (noting that "*Mount Laurel* adds new life to the hope that land use litigation may successfully break down metropolitan racial and economic segregation").

88. See, e.g., McDougall, *Revitalizing City*, *supra* note 80, at 667 (describing the "blistering academic criticism, municipal intransigence and legislative inaction" that followed *Mount Laurel I*); see also Payne, *supra* note 78, at 22 ("It is difficult to convey adequately the intensity of the public reaction to the *Mount Laurel* process since 1983. Where *Mount Laurel I* could be ignored because it was ineffective, *Mount Laurel II* worked and it stirred up a firestorm."). In addition to criticism directed against the wisdom of its policies, the New Jersey Supreme Court also was condemned strongly for intruding into what many contended was the legislative sphere. See, e.g., Berger, *supra* note 80, at 186-200; Jerome G. Rose, *Waning Judicial Legitimacy: The Price of Judicial Promulgation of Urban Policy*, 20 URB. LAW. 801, 818-39 (1988).

89. See, e.g., Jerome G. Rose, *Is the Decision Based on Wishful Thinking?*, in *AFTER*

ject of complicated, lengthy litigation that delayed actual implementation for a decade.⁹⁰ Only after further judicial elaboration in 1983,⁹¹ and then after the New Jersey legislature's passage of a statutory scheme in 1985 to provide administrative enforcement⁹² did the full contours of New Jersey's "fair share" doctrine take shape.

As presently interpreted, the New Jersey approach requires municipalities to do more than eliminate exclusionary zoning laws that deny housing opportunities to a region's low- and moderate-income population.⁹³ The state requires city-by-city efforts to meet each region's docu-

MOUNT LAUREL, *supra* note 32, 183, at 184-85 (noting that there are at least four basic alternative ways to measure "fair share"); Norman Williams, Jr., *On from Mount Laurel: Guidelines on the "Regional General Welfare,"* in AFTER MOUNT LAUREL, *supra* note 32, at 79, 85-96 (discussing unresolved issues raised by *Mount Laurel I*).

As the New Jersey Supreme Court itself acknowledged in *Mount Laurel II*:

Although the Court [in *Mount Laurel I*] set forth important guidelines for implementing the doctrine, their application to particular cases was complex, and the resolution of many questions left uncertain. Was it a "developing" municipality? What was the "region," and how was it to be determined? How was the "fair share" to be calculated within that region? Precisely what must that municipality do to "affirmatively afford" an opportunity for the construction of lower income housing? Other questions were similarly troublesome.

South Burlington County NAACP v. Township of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 205, 456 A.2d 390, 413 (1983).

90. As Professor McDougall observed:

The *Mount Laurel I* decision was a pathbreaking departure from previous approaches. Nonetheless, it could only tentatively sketch practical remedies for the rights it established. Consequently, the suburbs did not change their behavior and built little low and moderate income housing after the decision. Moreover, the uncertainty of standards for municipal compliance emboldened the suburbs to tie matters up in court with extensive argument over details.

McDougall, *Regional Contribution*, *supra* note 80, at 676; see also Chall, *supra* note 80, at 19 n.2 (noting that as of June 1985, over 135 *Mount Laurel* cases were in various stages of litigation).

91. The New Jersey Supreme Court made it clear in *Mount Laurel II* that municipalities were obligated to do more than remove exclusionary zoning statutes that denied low- and moderate-income housing opportunities; municipalities had affirmative obligations to bring about meaningful access to their communities. *Mount Laurel II*, 92 N.J. at 214-217, 258-78, 456 A.2d at 418-419, 442-452. The court also held that the obligation applied not only to "developing communities" that were undergoing rapid expansion, but to all communities, even older, more stable, "developed" communities, so long as they were designated as "growth areas" in New Jersey's State Development Guide Plan. *Id.* at 214-215, 456 A.2d at 418. Finally, the Court explicitly authorized "builders remedies," under which developers could sue noncompliant municipalities to obtain density bonuses that would permit them to build more housing units than a municipality's zoning ordinance would otherwise permit, so long as they agreed to designate a percentage of the units for low- or moderate-income sale. *Id.* at 218, 279-81, 456 A.2d at 420, 452-453; see *supra* note 78.

92. N.J. STAT. ANN. §§ 52:27D-300 to -329 (West 1986 & Supp. 1992).

93. Daniel Chall has underlined this new obligation:

[*Mount Laurel II*] calls for affirmative measures when simply removing restrictions

mented low- and moderate-income housing need. Under New Jersey's 1985 statute, a statewide administrative body, the Council on Affordable Housing (COAH),⁹⁴ divides the state into housing regions using regional planning criteria,⁹⁵ and then calculates the present and foreseeable housing need in each region.⁹⁶ It then allocates a "fair share" of low- and moderate-income housing to each municipality within the region.⁹⁷ Municipalities subsequently are invited to submit specific "fair share" plans to explain how they intend to supply their designated housing need.⁹⁸ Until the Council has certified a municipality's fair share plan, the municipality remains open to so-called "builders remedies"—lawsuits, first recognized in *Mount Laurel II*, that permit private developers to demand that local zoning boards open municipal sites to low- or moderate-income development.⁹⁹

on multi-unit structures would result in the construction of only high-priced middle-income housing

Nowhere does the opinion suggest that these social goals approximate the outcomes that would have prevailed in the absence of past exclusion. The Court's rulings instead seem to aim for specific land-use allocations that might never have otherwise occurred, even in a non-exclusionary housing market.

Chall, *supra* note 80, at 24-25. Professors Hughes and VanDoren have described the new obligation in even more dramatic terms:

The court not only ruled that there are severe limits on the right of suburban communities to restrict the entry of lower-income households but also set in motion the most fundamental redistribution of property rights ever attempted by a state government in the United States. The court insisted that the state's municipalities have an affirmative obligation to redistribute low- and moderate-income households more evenly across the state.

Hughes & VanDoren, *supra* note 80, at 97.

94. N.J. STAT. ANN. § 52:27D-305 (West 1986).

95. *Id.* § 52:27D-307.a, .e.

96. *Id.* § 52:27D-307.b.

97. *Id.* § 52:27D-307.c. The statute instructs COAH to credit each municipality "on a one-to-one basis [for] each current unit of low and moderate income housing of adequate standard," *id.* § 52:27D-307.c(1), and to take into account such factors as "available vacant and developable land, infrastructure considerations or environmental or historic preservation factors." *Id.* § 52:27D-307.c(2).

98. *Id.* § 52:27D-309 & -310.

99. *South Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 92 N.J. 158, 267-74, 456 A.2d 390, 446-50 (1983). According to New Jersey commentators, it was largely the desire for a "safe harbor" from "builders remedies" that prompted many municipalities to support the adoption of the 1985 Act. See Rose, *supra* note 80, at 209-10.

COAH has authority to certify a municipal "fair share" plan. N.J. STAT. ANN. § 52:27D-313 (West Supp. 1992). Certification by COAH entitles the municipality to a six-year period of repose, allowing it to transfer any builder's lawsuit during this period to COAH; certification also provides a strong, statutorily-created "presumption of validity" to a municipality's housing plan. *Id.* § 52:27D-317 (West 1986). See generally McDougall, *Regional Contribution*, *supra* note 80, 680-81; McDougall, *supra* note 78, at 635-37.

[The Council] occupies a curious position in the politics of affordable housing in New

As noted, *Mount Laurel* and the 1985 statute stop somewhere short of requiring municipalities to use their own funds to build needed low-income housing.¹⁰⁰ Instead, the statute contemplates that many municipalities will rely upon "density bonuses," mandatory "set-asides," or other zoning devices to induce private developers to include low- and moderate-income units among their market-level homes in housing developments.¹⁰¹ To date, New Jersey's fair share approach has generated a substantial flow of new low- and moderate-income housing.¹⁰²

The New Jersey approach has parallels in the statutes of a number of other states and localities, including California,¹⁰³ Connecticut,¹⁰⁴

Jersey because it has no power to command action by the municipalities that appear before it. Municipalities do so voluntarily, and the COAH's only "sanction" is its power to deny substantive certification of the municipality's housing plan, which, in turn (and in theory), leaves the municipality vulnerable to a *Mount Laurel* suit in superior court.

Payne, *From The Courts*, *supra* note 80, at 80.

100. Professor Jerome Rose describes the requirements of the Act as follows:

The [1985] legislation reduces, but does not eliminate, the ambiguity of the extent of the municipal obligation to help finance affordable housing. The legislation declares in several places that the obligation imposed . . . relates to *regulation of land use* with the implication that it does not include *funding*. However, in the preparation of a municipal housing element, the Act requires every municipality to "consider" several techniques that involve municipal expenditures.

Rose, *supra* note 80, at 207; see N.J. STAT. ANN. § 52:27D-311.a (West 1986) (detailing the technique to be considered).

101. N.J. STAT. ANN. § 52:26D-312.a (West 1986). In a controversial modification of the original judicial approach, the 1985 statute also has allowed any municipality to "transfer" up to 50% of its fair share obligation to a "receiving jurisdiction" (usually a central city), by offering to pay for the construction of *Mount Laurel* units in the receiving jurisdiction. *Id.* §§ 52:27D-311.c, -312.

This provision has stirred theoretical debate. See generally McDougall, *Regional Contribution*, *supra* note 80, at 681-95 (contending that New Jersey cities' weak financial position makes them unable to bargain with suburban "sending" municipalities for payments that will cover the full municipal costs of the transferred housing and that will protect the housing needs of urban dwellers); Hughes & VanDoren, *supra* note 80, at 108-10 (urging that each region include not only a receiving municipality but several potential sending municipalities, so that receiving municipalities can bargain for the best deal). The provision, however, appears to have had little practical impact; according to one recent survey, only 813 regional contribution units were identified among the 23,516 on which the surveyors had information. Lamar et al., *supra* note 80, at 1210 tbl. I. Professor Stegman, quoting the executive director of COAH, suggests that just over 1000 units—fewer than 10% of the 11,451 completed units in his survey—were the product of regional agreement units. Stegman, *supra* note 80, at 24.

102. Lamar et al., *supra* note 80, at 1209 (noting that 54 municipalities surveyed in 1988 reported that 2803 affordable units had been completed, that 11,133 more were pending or under construction, and that 8740 were proposed by 1993, for a total of 22,703 units); *id.* at 1258 ("This is far and away the principal source of affordable housing being constructed for lower-income households in New Jersey."); see also Stegman, *supra* note 80, at 24-25 (reporting that a total of 32,000 fair share units have been completed or are under construction—ten times the recent production rate for federally-assisted housing in New Jersey).

103. By law, every community in California is required to adopt a long-term development

Massachusetts,¹⁰⁵ and Oregon.¹⁰⁶ Only a few of these statutes and ordi-

plan that includes a housing element. CAL. GOV'T CODE §§ 65580 to 65589.8 (West 1983 & Supp. 1993). The housing element must include a five-year projection of housing needs with a plan on how to meet those needs. *Id.* § 65583(c) (West Supp. 1993). Regional councils must allocate to localities the fair share of regional housing need based upon state-approved projections. *Id.* § 65584(a). Under a 1984 amendment, the California legislature required that each regional fair share plan must receive approval from the California Department of Housing and Community Development. *Id.*; see also Douglas W. Kmiec, *Exclusionary Zoning and Purposeful Segregation in Housing: Two Wrongs Deserving Separate Remedies*, 18 URB. LAW. 393, 410-11 (1986) (describing California's statutory approach to combatting exclusionary zoning).

In addition, each city or county must grant mandatory density bonuses of 25% or provide other incentives, in exchange for requirements that private developers include 10% low-income units, or 25% moderate-income units, or 50% elderly units, in every housing development that exceeds five units. In the alternative, the developers may be required to make an in-lieu contribution to a fund for the construction of low-income housing. The definitions of "low-income" and "moderate-income" under the California law are very broad; "low-income" applicants include all those with incomes below 80% of the county median income, and "moderate-income" applicants are those with incomes between 80% and 120% of the county median income.

Very recently, the legislature revised the statute to grant more generous incentives to developers and to tighten the targeting of the statutory categories, adding a very-low-income category.

The California legislature, however, has not given enforcement authority to any administrative agency; instead, it has committed enforcement to the judiciary in lawsuits brought by aggrieved applicants. This has proven to be a weak and ineffective means by which to achieve compliance. See generally Robert C. Ellickson, *The Irony of 'Inclusionary' Zoning*, 54 S. CAL. L. REV. 1167 (1981); Stegman, *supra* note 80, at 5-9, 19.

104. A recent Connecticut statute creates an expedited, direct appeal to a specially designated state superior court whenever a local zoning commission or municipal planning authority denies an "affordable housing development plan"—defined to include both governmentally-assisted housing plans and private developments in which at least 20% of the units will be reserved for persons with incomes below 80% of area medians. CONN. GEN. STAT. ANN. § 8-30g(a) (West Supp. 1992). The statute creates a safe harbor from developer litigation for any Connecticut municipality in which 10% of all dwelling units are assisted housing or affordable housing, *id.* § 8-30g(f), or in which an affordable housing project has been certified by the Department of Housing within the previous year. *Id.* § 8-30g(g). See Stegman, *supra* note 80, at 14-15.

Connecticut also recently adopted legislation requiring its local zoning commissions to include, within their required local development plans, some "provision for the development of housing opportunities . . . for all residents of the municipality and the planning region, . . . [which] shall also promote housing choice and economic diversity in housing, including housing for both low and moderate income households. . . ." CONN. GEN. STAT. ANN. § 8-23(A) (West Supp. 1992). Coordinate legislation requires Connecticut's Commissioner of Housing and the Connecticut Housing Finance Authority to supervise these plans, make annual reports to the Connecticut legislature, *id.* §§ 8-37aa, -37bb, and administer the program to promote "fair housing choice and racial and economic integration." *Id.* § 8-37cc.

105. Massachusetts enacted an "anti-snob" law in 1969, which permits a quick appeal from any zoning decision by a town that denies a developer's plan to build low- or moderate-income housing. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1983 & Supp. 1992). The statute defines affordable housing as "any housing subsidized by the federal or state government." *Id.* § 20; see Stegman, *supra* note 80, at 12. The law provides for a one-stop local approval from the local Zoning Board of Appeals for all needed development permits, MASS. GEN. LAWS ANN. ch. 40B, § 21 (West 1983), and then permits an appeal of any unfavorable decision to a

nances, however, require a statewide assessment of need; instead, most create inflexible requirements that developers include a fixed percentage of low-income units in any new developments, as in California, or allow developers in communities with disproportionately small percentages of low-income housing units a superior channel to demand rezoning, as in Massachusetts.

Despite its virtues, the New Jersey approach has five crucial deficiencies in design and in implementation that render it insufficient as a federal remedy for residential racial segregation.¹⁰⁷ First, by omitting express racial goals and by failing to monitor low-income participants to ensure racial diversity, it allows suburban municipalities to create hous-

special State Housing Appeals Committee. *Id.* § 22. The Committee is required to overturn a town's adverse zoning decision if a developer's plan proves to be "consistent with local needs" for subsidized housing. *Id.* § 23. A town will be deemed conclusively to have met its low- and moderate-income need only if (1) more than 10% of its total housing units are low- and moderate-income, (2) more than 1.5% of the total land area zoned for residential, commercial, or industrial use in the town is comprised of such units, and (3) the developer's proposed project would occupy more than 0.3% of all town land, or would occupy 10 or more acres (whichever is larger in any calendar year). *Id.* § 20. See McDougall, *supra* note 78, at 645-47. Between 1969 and 1988, a very high percentage of all such applications have been approved either locally or on appeal to the Housing Appeals Board. See Stegman, *supra* note 80, at 11 (reporting that among the 33,684 units sought to be built during this time, approximately 20,000 were in advanced planning, under construction, or completed).

In addition to these legal remedies, Massachusetts Executive Order No. 215 recites that state and federal development grants will be denied to any municipality that persists in the enforcement of exclusionary zoning ordinances. Mass. Exec. Order No. 215 (1982). Although the Massachusetts Executive Office of Community Development is charged with implementing this order, commentators suggest that it has not acted with sufficient vigor. See, e.g., McDougall, *supra* note 78, at 648 ("Executive Order No. 215 is a strong and necessary weapon . . . but it must be more aggressively enforced.").

Despite these tools, moreover, most affordable housing in Massachusetts continues to be built in urban centers, not suburbs or rural areas. According to Professor Stegman, "just 1.4 percent of all family housing in Massachusetts suburbs is classified as affordable, while 95 cities and towns . . . contain no affordable housing at all." Stegman, *supra* note 80, at 11-12.

Recently, Massachusetts has encouraged localities to take more affirmative steps; in a move somewhat reminiscent of New Jersey's current approach, the state has promised municipalities that certification of their Housing Development Action Plans—which must include an assessment of housing needs, concrete plans to meet those needs, and some objective measures of success—will bring a three-year presumption of validity to subsequent town decisions on developers' permit requests. *Id.* at 13-14.

106. Oregon has a state-level administrative apparatus, including a Department of Land Conservation and Development and a Land Conservation and Development Commission (LCDC), that regulates all land-use control by localities, not merely low-income housing uses. ORE. REV. STAT. §§ 197.005-.850 (1989). The LCDC can mandate local compliance with its statewide goals by administrative order. *Id.* § 197.320. See McDougall, *supra* note 78, at 649.

107. See generally Payne, *supra* note 78, 30-32 (noting that COAH has defined New Jersey's housing regions in ways that "wall off" those areas with the greatest housing need from those areas with the greatest source of supply, and that COAH has grossly underestimated actual housing need).

ing subject only to the weak anti-discrimination requirements of the federal and state fair housing laws. Not surprisingly, recent surveys reveal that virtually all of the low- and moderate-income housing units built under New Jersey's fair share program have been filled by white applicants.¹⁰⁸

Second, the statute effectively permits municipalities to meet their fair share obligations by serving only the most well-off among eligible applicants. This is true for several reasons. The New Jersey approach links eligibility for *Mount Laurel* housing to the state's median income; an applicant can qualify for a "moderate income" unit with an annual income that is eighty percent of the statewide median, and for a "low income" unit with an annual income that is fifty percent of the statewide median.¹⁰⁹ Because New Jersey has a relatively high median income (roughly \$38,000 in 1990) *Mount Laurel* units are available to applicants with incomes of \$19,000 to \$30,400.¹¹⁰ While persons at these income levels undoubtedly experience difficulty in purchasing or renting housing in markets as tight as those of the 1980s, they are not the urban poor whose housing plight prompted the *Kerner Commission Report* or the initial *Mount Laurel* opinion.¹¹¹

Moreover, by tying *Mount Laurel* eligibility to current income, the statute allows municipalities to provide below-market housing to many persons who are income-poor only because of predictable, short-term life-cycle circumstances (e.g., students or young married couples) or because of sudden, temporary economic changes (e.g., recently divorced

108. The available data, while incomplete, shows minority underrepresentation to be a very serious problem: "Many developments have very small minority populations and, within that minority population, even smaller numbers of black residents. At least three *Mount Laurel* developments appear to have no black residents; in some other developments the percentage of black homebuyers varies from 1% to 3%." Lamar et al., *supra* note 80, at 1256. This was not an unforeseen development. Norman William, one of the lawyers for the original *Mount Laurel I* plaintiffs, warned in 1975 that the predominant beneficiaries of the decision likely would be white ethnic citizens. See Williams, *supra* note 89, at 95.

109. Lamar et al., *supra* note 80, at 1232-33.

110. See *id.* at 1237 (discussing maximum incomes for different sized families, and providing a table showing income eligibilities from \$10,621 (for a single-person family at 40% of median) to \$32,128 (for a nine-person family at 80% of median)).

111. The New Jersey Public Advocate has charged that COAH regulations on income exclude more than half of New Jersey's moderate-income families and almost 75% of New Jersey's low-income families from the effective reach of the fair share program. Initial Comments by the Dep't of the Public Advocate upon the Proposed Substantive Regulations of the Council on Affordable Housing, Stephen Eisdorfer, Ass't Deputy Public Advocate, June 30, 1980, at 4-6, cited in McDougall, *supra* note 78, at 640-41 n.111. This too, is not an unexpected development. See George Sternlieb, *Mount Laurel, Economics, Morality And the Law*, in AFTER MOUNT LAUREL, *supra* note 32, at 291, 296 ("Without deep and widespread subsidies, *Mount Laurel* will enrich many landholders while making it possible to accommodate more of the middle class . . .").

persons). In fact, a significant proportion of *Mount Laurel* beneficiaries appear to fall into these relatively less needy categories.¹¹²

Additionally, the New Jersey statutes and regulations do not mandate the bedroom size of housing units. Since many municipalities correctly calculate that smaller families place fewer demands on local fiscal resources than do larger families with school-aged children, there is a strong tendency to favor one-bedroom townhouses or other smaller units that are inappropriate for larger families.¹¹³ No serious attempt is made to provide a proportionate number of larger units to meet the family needs of the state's low- and moderate-income families.

A *third* principal flaw is that neither the New Jersey statute nor COAH's implementing regulations obligate a municipality to engage in any affirmative marketing of their units to low-income residents of urban areas, or forbid a municipality from filling its fair share housing with long-term, low-income residents.¹¹⁴ While this deficiency might not be fatal if COAH had calculated fair shares in a manner that accounted fully for both a municipality's internal housing need and its share of the

112. See, e.g., Hughes & VanDoren, *supra* note 80, at 105:

A peculiar distributional consequence of Mount Laurel policies arises because the income guidelines take a static instead of a life-cycle view of income. At any point in time, many young people are poor even though they will not have a low income over their life cycle. These currently low-income but future middle-class citizens are ideal candidates for Mount Laurel mortgages, although the absence of Mount Laurel would simply delay rather than deny them homeownership.

See also Lamar et al., *supra* note 80, at 1254 (observing that the occupations of *Mount Laurel* participants "are very close to the national distribution of occupations by general category," with the largest single category being "[p]rofessional, technical, [and] managerial administrative workers"); *id.* at 1259 (finding that *Mount Laurel* beneficiaries typically come from three groups, "the temporarily poor . . . mostly young people, some just out of college and in their first jobs, and some recently-divorced women").

113. [M]ost of the low-income rental housing being produced is being produced for senior citizens [V]irtually no rental housing is being produced for younger low-income households, including families with children, and these households are the ones least likely to be able to take advantage of the larger quantity of sales housing preferred by market-oriented private developers.

Lamar et al., *supra* note 80, at 1214-15. The Public Advocate has faulted COAH regulations for failing to prescribe a minimum number of multi-bedroom units, McDougall, *Regional Contribution*, *supra* note 80, at 685 n.151, and for permitting developers to sell larger-bedroom units to single-person households, thwarting the social end in having such larger units. Lamar et al., *supra* note 80, at 1236.

114. Lamar et al., *supra* note 80, at 1222-23 (discovering that among ten COAH-certified municipalities that were studied intensively, most had formal criteria favoring applicants already connected with the municipality, such as municipal residents, employees in the community, etc.). Once again, this pattern was forecast by earlier commentators. See, e.g., Franklin et al., *supra* note 32, at 301 (stating that unless *Mount Laurel* housing is reserved for migrants, it is "likely [to] . . . be occupied primarily by lower income households already in or near the jurisdiction . . . or . . . moderate income persons familiar with the jurisdiction because they already are employed there").

regional need, many critics have argued that COAH's calculation of overall need is far too low. As a consequence, many municipalities can fulfill their fair share requirements without ever venturing beyond municipal boundaries to find low-income applicants, thereby defeating one major objective of the original plan.¹¹⁵

Fourth, because of the scarcity of substantial state or federal housing subsidies, New Jersey's approach relies very heavily upon the private market for the creation of affordable housing.¹¹⁶ Unfortunately, for-profit developers approach *Mount Laurel* obligations with the natural desire to maximize their profits, not with a commitment to satisfy the state's most compelling housing needs. Since economic conditions in the mid-1980s promised greater potential profits from new homes than from rental apartments, New Jersey developers used their density bonuses and mandatory set-asides to build new homes, even though these units entailed far higher consumer costs (substantial down payments, closing costs, etc.) than would rental or rehabilitated units, and even though these costs proved beyond the ability of many low-income persons to pay.¹¹⁷ Further, since the sale price of a *Mount Laurel* unit was pegged to the successful applicant's income, developers attempted to sell units to applicants who qualified at the very highest eligible income levels. Most successful applicants had incomes just below the statutory maxima of fifty and eighty percent of the statewide median income.¹¹⁸

Finally, the program, as noted, contains no absolute requirement

115. See, e.g., McDougall, *Regional Contribution*, *supra* note 80, at 684-85.

116. According to the 1983-1988 study of *Mount Laurel* programs, some 75% of all housing units completed were the products of market-driven, set-aside development. Lamar et al., *supra* note 80, at 1210-11. In their recommendations, these analysts urged a far greater financial commitment from the State of New Jersey:

Important as the inclusionary technique is, it is inherently limited; there can never be enough demand for market rate housing to carry in its wake the amount of lower-income housing necessary to meet the need. In addition, the type of lower-income housing produced through inclusionary developments is likely always to be skewed, to some extent, toward sales housing for households in the upper reaches of the low- and moderate-income populations. Finally, the fact that a municipality must approve a far larger number of units in order to create the opportunity to meet its fair share goals in this manner has always been seen as a problem by many municipalities concerned about broad issues of growth and development.

Id. at 1268-69.

117. See, e.g., Lamar et al., *supra* note 80, at 1261 ("Rental housing is the only possible option for many low-income households who are unable to get financing or do not have enough cash for down payments and closing costs . . . [Yet] rental housing for non-elderly low-income households is almost non-existent in the *Mount Laurel* plans surveyed."); McDougall, *Regional Contribution*, *supra* note 80, at 685 n.151 (noting that the New Jersey Public Advocate has criticized initial COAH regulations for their failure to require a focus on rental housing).

118. Hughes & VanDoren, *supra* note 80, at 104 (describing the "perverse notch effects" of

that municipalities participate, and many have not done so, apparently unconcerned by the prospect of facing "builder's remedy" litigation.¹¹⁹ Thus, municipal responsibilities for "fair share" are not distributed fairly, and New Jersey, perhaps exhausted by the fifteen-year struggle for a statewide statute, has taken no meaningful affirmative steps to enforce the law against non-complying jurisdictions.

III. THE FEDERAL FAIR SHARE PLAN

A. Basic Features of the Program

Drawing upon both the positive and negative experiences in New Jersey, Congress should craft a National Fair Share Act that would implement the positive features of New Jersey's important and partially successful, state-level experience. That act should take the traditional form of a federal grant-in-aid statute¹²⁰ that requires all states and localities wishing to receive various federal expenditures and other financial benefits to comply with its terms.¹²¹ It should follow the structure already in place under the Cranston-Gonzalez Affordable Housing Act of

Mount Laurel guidelines caused by developers who build units "affordable by people with incomes just below the 50 and 80 percent levels").

119. Lamar et al., *supra* note 80, at 1266-67.

120. To avoid constitutional issues that might emerge if Congress directly imposed the obligations of this Act, the statute should be structured as grant-in-aid legislation, under which states and municipalities that choose not to meet the requirement of the Act will be excluded from participating in the financial benefits of the federal program. Grant-in-aid programs have been routinely employed by Congress since the 1930s to further nationwide compliance with important policy objectives while simultaneously honoring state sovereignty and federalism concerns reflected in the Tenth Amendment and the structure of the federal Constitution. *See, e.g., Steward Machine Co. v. Davis*, 301 U.S. 548, 585-98 (1937) (upholding the federal unemployment compensation requirements of the Social Security Act of 1935 against contentions that they unconstitutionally coerced state participation in the program and required states to surrender their quasi-sovereign powers). Modern constitutional conceptions of federal-state relations permit federal statutes such as the National Fair Share Act to "attach conditions on the receipt of federal funds, and . . . employ[] the [spending] power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Berger, C.J.)). The Court in *Dole* indicated that only four limitations constrained the federal spending power: (1) it must be for "the general welfare," (2) Congress must signal to states in unambiguous terms the conditions upon which their receipt of federal funds turns, (3) the conditions imposed on the states should be related to the federal interest in the program, and (4) the program conditions should not otherwise violate an independent constitutional requirement. *Id.* at 207-08.

121. Some may question why Congress must act at all if a number of states already have begun to address the issue. The answer is clear: Without congressional prodding most states are unlikely to initiate meaningful reform. Even in New Jersey,

the state legislature was immobilized on the exclusionary zoning issue due to opposition by suburban lawmakers, who worked closely with the local officials elected in

1990.¹²² At the federal level, the Fair Share Act should authorize a substantial sum of monies over a substantial period, perhaps five billion dollars a year for ten years, to assist states and municipalities to implement the act. It should also designate a lead agency to administer the Act, granting it authority to promulgate implementing regulations. The lead agency, probably HUD, should have the technical capacity to offer active

their towns. The New Jersey State Legislature thus avoided the problem of exclusionary zoning until the New Jersey Supreme Court's rulings forced it to act.

McDougall, *supra* note 78, at 660. New Jersey's unusually activist state supreme court is unlikely to be paralleled in other jurisdictions. In short, just as institutional paralysis prevented state legislatures from addressing their reapportionment needs during the 1950s—a paralysis not overcome until the federal judiciary intervened in *Baker v. Carr*, 369 U.S. 186, 237 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964)—paralysis prevents effective state or local action against residential segregation today. A federal initiative is needed to prompt states and localities to meet this national problem head-on.

122. Pub. L. No. 101-625, 104 Stat. 4079 (codified at 42 U.S.C. § 12701 (1990)). As the brief description below illustrates, much of the structure necessary to implement a National Fair Share Act is already in place under the provisions of the Affordable Housing Act. That Act presently requires all localities wishing to receive HUD funds to submit a Comprehensive Housing Affordability Strategy (CHAS). 42 U.S.C. § 12705(a)(1)-(2) (1990). The Act contemplates that a CHAS will address, among other issues,

the jurisdiction's need for assistance for very low-income, low-income, and moderate-income families, specifying such needs for different types of tenure and for different categories of residents, such as very low-income, low-income, and moderate-income families, the elderly, single persons, large families, residents of nonmetropolitan areas . . . and other categories of persons residing in or expected to reside in the jurisdiction that the Secretary [of HUD] determines to be appropriate.

Id. § 12705(b)(1). A local CHAS also must address the issue of local "tax policies affecting land and other property, land use controls, zoning ordinances, building codes, fees and charges, growth limits" and "describe the jurisdiction's strategy to remove or ameliorate negative effects, if any." *Id.* § 12705(b)(4). Additionally, a CHAS must discuss the local private, nonprofit, and public housing institutions available to assist the municipality to meet its housing needs, *id.* § 12705(b)(5), as well as the expected non-federal sources of revenue upon which it will rely to meet those needs. *Id.* § 12705(b)(6).

The Act then authorizes several billion dollars in appropriations for investment in affordable housing, principally rental housing for very-low and low-income families. *Id.* §§ 12722(1), 12724. It allows jurisdictions receiving the funds to employ them for acquisition of rental units, new construction of units, substantial rehabilitation, and other expenditures at local discretion, with a statutory preference for rehabilitation. *Id.* § 23742(a)(1)-(2). It also requires localities planning federally-subsidized housing rehabilitation or new construction projects to contribute 25% in local funds toward the total cost of rental assistance or rehabilitation projects, 33% toward substantial rehabilitation, and 50% toward any new construction project. *Id.* § 12750(a). In addition, states are required to set aside 15% of federal funds under the HOME program for qualified community development organizations and other non-profit housing providers. *Id.* § 12771.

Like Peter Salsich's proposals elsewhere in this Special Issue, the National Fair Share Act would continue this decentralized process for decisionmaking on community housing needs, so long as local plans prove consistent with overarching federal housing goals. See Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?*, 71 N.C. L. REV. 1619, 1637-39 (1993) (advocating the decentralization of HUD's spending decisions on housing programs).

assistance to states and municipalities in their planning efforts, as well as the power to enforce compliance with the statute.

The statute should require each state participating in the fair share program to designate a central planning or development agency, like COAH in New Jersey, to coordinate and oversee implementation of the statute at the state level.¹²³ State agencies should have the responsibility: (1) to identify housing regions throughout the state; (2) to calculate the extent of residential segregation¹²⁴ and of low-income housing need in

123. This assignment of an important coordination and oversight role to the states is not totally inconsistent with the relationships provided for by the Affordable Housing Act. Under that Act, HUD disburses 60% of its authorized funds directly to local governments and 40% to the states. 42 U.S.C. § 12747(a)(1) (1990). States are required, in turn, to redistribute HUD funds "throughout the State according to the State's assessment of the geographical distribution of the housing need within the State, as identified in the State's approved housing strategy." *Id.* § 12752(b). Although the Act permits HUD to encourage coordination between states and their municipal entities, it explicitly provides that a "local government shall not be required to have elements of its housing strategy approved by the State." *Id.* § 12705(d). The National Fair Share legislation would modify that provision by subjecting municipal fair share plans to state approval.

Why is this state oversight necessary? There are two reasons. First, most local municipalities operate under the influence of strong parochial interests that prevent them from addressing region-wide housing needs with impartiality:

The spatial fragmentation of land-use controls . . . means that no public body represents the interest of the metropolitan area as a whole. All governments with powers over land use have parochial interests and focus their policies on serving only the welfare of their own relatively narrow group of residents. In this governmental system . . . [n]o entities exist that are motivated to formulate [metropolitan-wide] policies, and none have the legal power to adopt them. . . .

This inherent parochialism is a crucial attribute of the U.S. policy environment concerning land-use matters. Policies that require metropolitan area-wide perspectives or behavior remain largely theoretical in most such areas because no real-world organizations with much power will adopt them or can execute them. This is true even though many of society's most pressing problems could only be effectively ameliorated by actions designed and carried out from a metropolitan-area-wide perspective.

Downs, *Policy Directions*, *supra* note 26, at 715.

Once the need for oversight is clarified, the choice of overseers quickly narrows to either HUD or a state agency. The task is too large for HUD or any other federal agency to do well. Indeed, one contributing reason for the failure of the HAP program under the Housing and Community Development Act of 1974 was that program's dependence upon HUD's review of thousands of local plans, an administratively unrealistic burden.

This preference for state responsibility is consistent with the call by Professors Fainstein and Markusen for adherence to "the principle of federal funding with state and local implementation." Susan S. Fainstein & Ann Markusen, *Urban Policy: Bridging the Social and Economic Development Gap*, 71 N.C. L. REV. 1463, 1484 (1993).

124. Various measures might be developed to determine racial segregation, from the simplest gross calculation of the disparity between the racial composition of the municipality under consideration and the metropolitan region as a whole to very complex measures taking dozens of non-racial factors into account. This proposal does contemplate, however, that a municipality's "fair share" for racial purposes would approach some significant fraction of the

each region; (3) to assign to each municipality a fair share of the ascertained regional need;¹²⁵ (4) to assist those municipalities that have not created municipal fair share plans;¹²⁶ (5) to monitor municipal compliance with their fair share plans; (6) to supervise selection of tenants and potential homeowners;¹²⁷ and (7) to assure adequate re-rental and resale

overall metropolitan racial percentage. In a metropolitan region that is, for example, 35% African American, a state planning agency might assign to a municipality that is 99% white a ten-year African-American housing goal of 10%, assuming that no special circumstances affected the municipality's growth prospects, its employment circumstances, its housing stock, etc.

Of course, it would be crucially important in drafting the Act and its implementing regulations to adopt clear standards to guide states in this allocation process, ensuring a meaningful degree of actual desegregation. At this stage of the analysis, however, a precise determination of the acceptable minimum percentages is a secondary consideration.

125. See *infra* notes 150-65 and accompanying text (discussing community alternatives).

126. Many municipalities, perhaps a majority, would not have any affirmative housing obligations under this legislation since they already contain a substantial number of low- and moderate-income housing units or are already racially diverse. Research suggests that municipalities and regions vary widely in their extent of residential segregation, with the Midwest and Northeast the most segregated, and the South and the West the least so. See, e.g., Reynolds Farley, *Residential Segregation of Social and Economic Groups Among Blacks, 1970-80*, in *THE URBAN UNDERCLASS* 274, 281-82 (Christopher Jencks & Peter E. Peterson eds., 1990).

This proposal, however, should not be interpreted to advocate that HUD confine all federal housing funds to municipalities with affirmative obligations under the National Fair Share Act or restrict the ability of other needy municipalities—many of them larger cities—to receive federal housing construction and rehabilitation funds. In the past, overreliance upon spatial deconcentration as a criterion for HUD expenditures has led to justifiable criticism of HUD's site selection criteria for federally assisted housing and similar provisions under the Housing and Community Development Act of 1974. See Calmore, *supra* note 32, at 9-18 (criticizing HUD's 1972 site selection criteria and the HCDA of 1974 because of their severely adverse impact on distressed urban minority communities).

127. Each state should designate state or regional entities to take applications from low-income persons in various urban areas who are willing to relocate in municipalities that have fair share obligations. At present, the Affordable Housing Act already requires each locality receiving HUD funds to "make reasonable efforts to confer with appropriate social service agencies regarding the housing needs of children, elderly persons, persons with disabilities, homeless persons, and other persons served by such agencies." 42 U.S.C. § 12705(e) (Supp. II 1990). This requirement, however, does not establish any affirmative obligation to provide housing for such persons or to look beyond municipal borders.

The Act should draw upon the successes of the *Gautreaux* Demonstration experiment, which was first established under a settlement between HUD and plaintiffs in a Chicago lawsuit. See *Hills v. Gautreaux*, 425 U.S. 284, 286 (1976). Under the settlement reached in that case, HUD agreed to provide housing certificates that would supplement the rental payments of inner-city residents and to support an office that counsels residents seeking to relocate to rental housing throughout the metropolitan Chicago area. The program has been in operation for over 15 years and has placed over 3900 families. See James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519 (1993); James E. Rosenbaum & Susan J. Popkin, *Employment and Earnings of Low-Income Blacks Who Move to Middle-Class Suburbs*, in *THE URBAN UNDERCLASS*, *supra* note 126, at 342, 342.

Alternatively perhaps, very low-income applicants could be selected from volunteers

restrictions.¹²⁸

To carry out these activities, each state should receive substantial, new federal financial assistance that should meet their additional staff and technical assistance requirements and allow planning assistance to willing municipalities.¹²⁹ States also should receive substantial federal funds to implement local plans, and to be dispersed to municipalities, local housing authorities, private non-profit housing corporations, fair housing groups, housing trust funds, or others acting in furtherance of state and local fair share objectives.¹³⁰

Each municipality found to have an unmet fair share responsibility should be obligated to: (1) choose a low-income goal or an integration goal; (2) develop concrete plans for meeting the goal; (3) submit these plans to the designated state agency for certification (subject to ultimate federal agency review); and (4) once certified, take necessary steps to implement the plan.

The Act should be framed to avoid the deficiencies of the New Jersey fair share legislation. First, subject to the election options set forth in Section III, the Act should require states and municipalities to take explicit account of the racial composition of fair share households. Second, the Act should require municipal plans to address the needs of a broader distribution of low-income applicants, including a substantially greater percentage of very-low-income applicants. States should also prescribe housing goals by bedroom sizes, so that municipalities will be able to accommodate the housing needs of large low-income, minority

among those who had successfully completed the education or employment training components of the Family Support Act. 42 U.S.C. §§ 602(a)(19), 607(b)(1)(A)(ii), 681-687 (1988). Such an approach would provide an additional incentive for families with children in the Aid to Families with Dependent Children (AFDC) program to complete their Support Act obligations, and it would assure a steady stream of very-low-income applicants to be placed in fair share communities.

Under either alternative, the provision of well-supervised pre-screening and counseling services should help alleviate suburban fears that the urban participants in such programs would bring crime or anti-social values to their new communities. See DOWNS, *supra* note 22, at 73-77 (noting that the fear of crime and aberrant social behavior by in-migrants are two major white objections to racial integration).

128. As under the New Jersey Fair Housing Act, it would be necessary to provide resale or re-leasing constraints in order to preserve the low-income character of housing units created by market-related programs. Otherwise, a participant could simply resell a below-market unit at the market price to a bona fide market purchaser, pocket the profit, and defeat the essential purpose of the legislation. See N.J. STAT. ANN. §§ 52:27D-321f, -324 (West 1986).

129. The Affordable Housing Act already empowers HUD to provide federal funds and other assistance to create state and local technical and administrative capacity. 42 U.S.C. §§ 12781-12783 (Supp. II 1990).

130. See *infra* note 157 and accompanying text; 42 U.S.C. § 12747(a)(1) (Supp. II 1990).

families, as well as smaller families and single persons.¹³¹ Third, the Act should require states and municipalities to select a substantial fraction of recipients from beyond their municipal borders, drawn from lists to be established in conjunction with social service agencies and administered by the state agency.¹³² Fourth, states and municipalities should be encouraged to provide many more subsidized rental apartments via the rehabilitation of existing units, Section 8 certificate placements, or public housing. This encouragement would come through the Act's expansion of federal housing subsidies, in addition to the stimulation of private, for-sale units through density bonuses and other market-driven strategies.¹³³ Finally, it is critical for the Act to have unmistakable, strong incentives to stimulate state and municipal cooperation.

B. *Incentives for Compliance*

The fair share framework creates myriad possibilities for delay and evasion by municipalities motivated to resist the Act. To ensure its success, therefore, strong federal incentives must be created to induce municipal compliance. History teaches that, although necessary, positive financial incentives alone will not induce many suburban communities to

131. These goals are already reflected in the Affordable Housing Act of 1990, although they are not set forth as indispensable requirements there. 42 U.S.C. §§ 12705(b)(1), 12744, 12745, 12747(b)(1)(B) (Supp. II 1990). The exact targets under the new Act should reflect the proportionate income distributions, the family-size variations, and other pertinent characteristics of the low-income population of each metropolitan area. For example, in areas where the income distribution is skewed toward very-low-income citizens and large families, the proportion of very-low-income citizens and large families targeted as participants in the program should be greater than in metropolitan areas with different income characteristics.

States should be required expressly to disaggregate each category by race and ethnic origin and to assign overall housing goals in a manner that does not inadvertently disadvantage African Americans or other ethnic minorities with different income or family-size characteristics from other low-income participants in the program.

132. The New Jersey experience demonstrates the need to require affirmative outreach beyond the municipality's borders. However, the experience under HUD's Affirmative Fair Housing Marketing Program strongly suggests that merely requiring developers of low-income housing to market their units affirmatively to those "least likely to apply" is an insufficient approach. See John M. Goering, *Introduction to HOUSING DESEGREGATION AND FEDERAL POLICY*, *supra* note 24, at 202-05.

Instead, drafters of this legislation should require either an expansion of the *Gautreaux* program, including the development of metropolitan-wide housing counselling and placement services, or the development of low-income housing eligibility roles in coordination with state and local agencies that administer the Family Support Act. See *supra* note 127.

133. This goal currently is reflected both in the graduated level of local matching contributions in the Affordable Housing Act of 1990—which require only a 25% local contribution of local funds to receive federal funds for rental assistance and housing rehabilitation projects, but a 50% local contribution to receive federal funds for new construction projects, 42 U.S.C. § 12750(a) (Supp. II 1990)—and in the AHA's provisions for federal targeting of funds. *Id.* § 12747(b)(1).

participate in federal programs that could lead to racial or economic dispersal.¹³⁴

Some policy analysts have recommended that noncomplying jurisdictions be threatened with loss of all federal community development funds.¹³⁵ Numerous municipalities, especially in upper-income areas, receive little direct federal funding; for those communities, at least, the threat would be hollow.¹³⁶ Moreover, extending the cut-off to other locally-received federal funds might prove counterproductive; many federal dollars currently flowing into municipalities are targeted for programs that disproportionately serve lower-income residents (for example, Title I educational grants¹³⁷). To deprive municipalities of these funds would impose a disproportionately heavy burden on the municipality's low-income citizens. Indeed, many municipalities deeply resistant to further economic and racial integration might well forego these federal benefits and allow their indigenous low-income population to suffer rather than assume their fair share obligations.

There is, however, another possible approach. Most suburban officials plausibly explain their resistance to low-income and fair housing

134. See, e.g., Chandler, *supra* note 32, at 519 ("Suburban opposition to public housing is evident in the relative absence of public housing authorities and units within suburbs."); *id.* at 523-524 (describing middle-income neighborhood resistance); Goering, *supra* note 132, at 206 (reporting that "[s]ome local jurisdictions have consistently evaded any responsibility to re-house blacks in better quality, less segregated areas by simply not applying for federal funds"); see also Phillip L. Clay, *The (Un)Housed City: Racial Patterns of Segregation, Housing Quality and Affordability*, in BLACK & WHITE, *supra* note 17, at 93, 99-100 (noting the failure of federal rental voucher and certificate programs alone to disperse black families). George Galster's proposal to provide tax credits for those willing to make housing moves that would promote racial integration is a variant of this idea, targeted to higher-income citizens. GALSTER, *supra* note 29, at 24. His program would be a welcome additional approach, but because of acute federal budget constraints, it should not be the centerpiece of federal desegregation and low-income housing efforts.

135. See Downs, *Policy Directions*, *supra* note 26, at 721-22. Michael Vernarelli has described how HUD Secretary Romney attempted to induce more suburban communities to participate in federal housing programs during the early 1970s by "mak[ing] the deconcentration of assisted housing within a metropolitan area a condition for local communities' receipt of HUD housing and community development funds." Michael J. Vernarelli, *Where Should HUD Locate Assisted Housing?: The Evolution of Fair Housing Policy*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 24, at 214, 216-217. Vernarelli reports that "[t]he get-tough strategy did not succeed, mainly because HUD could not offer most communities enough of an economic reward to justify a local political confrontation over racial integration. The most conspicuous failures were in suburban communities." *Id.* at 217 (quoting William Lilley, III, *Housing Report: Administration & Congress Follow Courts in Promoting Residential Integration*, 3 NAT'L J. 2434 (1970)); see also ALEXANDER POLIKOFF, *HOUSING THE POOR: THE CASE FOR HEROISM* 31-41 (1978) (describing Romney's unsuccessful efforts during the early Nixon Administration).

136. NORMAN WALZER & GLENN W. FISHER, *CITIES SUBURBS, AND PROPERTY TAX* 124-25 (1981).

137. 20 U.S.C. §§ 2711-2713 (1988).

proposals as a reflection of "the will of their constituents."¹³⁸ Constituents, in turn, understandably (even if erroneously) explain their resistance as self-protective economics.¹³⁹ How can this link between residential integration and potential economic loss be broken? My suggestion is to revise two treasured features of the current tax system: The homeowner mortgage interest deduction¹⁴⁰ and the local property tax deduction.¹⁴¹ Together, these deductions provide to American property holders indirect federal housing subsidies totalling some \$81 billion each year.¹⁴² In municipalities refusing to establish and meet fair share goals, the National Fair Share Act should progressively withdraw from property owners these two tax deductions. The withdrawal would occur in increments over a period of years—perhaps ten percent during the first year of noncompliance, twenty percent the second year, and so on until a complete withdrawal of the deductions would be in place after ten years.¹⁴³

138. See *Spallone v. United States*, 493 U.S. 265, 268, 279-80 (1990) (vacating contempt fines imposed on city council members who refused to comply with federal housing desegregation orders and argued that they had both First Amendment rights and absolute legislative immunity when discharging their legislative responsibilities to constituents who opposed desegregation).

139. See Farley et al., *supra* note 17, at 336 (reporting that among the more than 400 whites in a Detroit survey who said they would move out of a neighborhood if it became at least one-third black, about 40% cited concern about declining property values).

140. See 26 U.S.C. § 163(h)(3) (1988).

141. See *id.* § 164(a)(1).

142. James R. Follain & David C. Ling, *The Federal Tax Subsidy to Housing and the Reduced Value of the Mortgage Interest Deduction*, 44 NAT'L TAX J. 147, 157 (1991). Some economists suggest that it is preferable to think of the mortgage interest deduction not as a federal subsidy for homeownership, but instead as the receipt of untaxed services from the use of the taxpayer's home. See Susan E. Woodward & John C. Weicher, *Goring the Wrong Ox: A Defense of the Mortgage Interest Deduction*, 42 NAT'L TAX J. 301 (1989). Woodward and Weicher argue that the deduction has several important benefits, all of which would be lost if it were abandoned. *Id.* at 301-02.

No matter how the deduction is viewed for other purposes, it is indisputable that deductions confer a valued, substantial benefit on homeowners. So long as the loss of the deduction would affect the prices of homes in noncomplying municipalities negatively, the incentives contemplated by the National Fair Share Act will do their intended work. As noted below, the intent of this legislation is not to deprive taxpayers of the deduction, but merely to condition its receipt upon municipal compliance with crucial federal housing policy.

143. This feature of the National Fair Share Act is a variant of a proposal for a "Pigovian tax" put forward by Michelle White in 1979. White, *supra* note 1, at 210. Professor White proposed to require local communities that wished to adopt exclusionary zoning regulations to pay a tax to a regional governmental body. *Id.* at 225-30. Such a tax would reflect the external costs, to nonresidents of the community, of the exclusionary zoning. *Id.* As Professor White explained: "A standard economic remedy for nuisances is the Pigovian tax, which gives nuisance creators a choice between paying a tax per unit of nuisance or ceasing to create the nuisance. The tax . . . is intended to discourage zoning by forcing the community to pay a positive price for it. . . ." *Id.* at 210.

Let me emphasize at once: The Act's objective would neither be to end federal support for this important social policy nor to deprive any taxpayer of these deductions.¹⁴⁴ No withdrawal will or should ever occur in the vast majority of American municipalities—for the good reason that most municipalities will comply with the terms of the Act. Furthermore, the graduated phase-in of withdrawals should allow taxpayers in noncomplying municipalities ample time, before any significant financial penalties have been felt, to persuade their reluctant public officials to cooperate in framing a fair share plan.

Furthermore, any tax receipts generated by the loss of these deductions should not be returned to the general treasury, but instead should be segregated by the Internal Revenue Service for eventual use in the non-compliant municipality. Once returned, the money would be used to support low-income housing or fair housing initiatives that would further the objectives of the Act.¹⁴⁵ In other words, municipalities engaged in non-compliance should be forewarned that they ultimately could not succeed in avoiding racial or economic integration. Citizens would be led to understand that, despite their resistance, the indirect tax subsidies they formerly enjoyed under the national tax policy would be recaptured and redirected in their own communities in furtherance of another paramount housing policy—to foster communities that are racially and economically integrated.

Beyond its deterrent value against municipalities contemplating resistance, this tax approach has a second, greater function: It is calculated to transform the market incentives that currently work against desegregation. Because buyers or renters of equivalent homes in fair share municipalities would continue to receive the considerable federal tax advantages destined to be lost by residents of resisting municipalities, municipalities that refused to assume their fair share obligations would become less financially attractive to many purchasers in a metropolitan housing market. In consequence, property values in racially and economically segregated communities would begin to fall, even as the overall federal tax burdens borne by municipal residents began to rise. As a

144. In this sense, the National Fair Share proposal is less radical than the proposal put forward by Peter Salsich, who suggests an absolute cap on mortgage interest deductibility and who also appears to muse about the elimination of the property tax deduction. Salsich, *supra* note 122, at 1634-36.

145. This idea bears some resemblance to Salsich's proposal for a Low Income Housing Investment Trust Fund, since it would create a stream of revenue dedicated to low-income housing construction. See *id.* at 1636-37. The principal difference is that the revenue here would be redirected toward housing resources in the very communities whose residents had forfeited their deductions because of municipal noncompliance with the Fair Share Act.

result, distinct market advantages would shift toward those communities actively pursuing integration.

This approach has one additional attraction. In the coming decades, when federal budget deficits are likely to make new federal revenues difficult to find,¹⁴⁶ it would "create" new dollars for low-income and minority housing by redirecting toward communities and programs that foster low-income and minority housing needs the flow of federal subsidies that are currently received by homeowners and property holders in communities determined to resist integration.

In addition to the powerful individual, tax-based incentives for compliance, the Act also should contain municipal sanctions by denying federal dollars for community infrastructure, community development, or housing purposes that would otherwise be destined for non-compliant municipalities.¹⁴⁷ Municipalities in active noncompliance also should be declared ineligible to issue municipal bonds free of federal taxation.¹⁴⁸ Although these municipal sanctions alone would not likely prompt compliance with the fair share proposal, they would surely provide useful additional motivation, beyond the losses faced by resident taxpayers, to impel municipal compliance.

Finally, if a state were to refuse to cooperate with the fair share program, the Act should require the forfeiture, not only of the state's fair share funds, but also of other federal funds designated for the development or improvement of municipal infrastructure¹⁴⁹ or for state infrastructure improvements, such as highways or bridges, that would otherwise assist segregated states in maintaining their racial or economic exclusivity.

Let me end this section by reemphasizing that the objective of these proposed sanctions would not be punitive. Instead, they would be designed to prompt compliance and to alter the views of market actors about the relative attractiveness of segregated and integrated communi-

146. See, e.g., Robert Greenstein, *Universal and Targeted Approaches to Relieving Poverty: An Alternative View*, in *THE URBAN UNDERCLASS*, *supra* note 126, at 437, 453-55 (noting that federal budget constraints during the 1990s are likely to be fierce due to the projected annual deficits and the large national debt).

147. See, e.g., DOWNS, *supra* note 22, at 161-62 (advocating establishment of effective local low-income housing programs as a prerequisite to receipt of various types of federal financial assistance); DOWNS, *Policy Directions*, *supra* note 26, at 741-42 (advocating establishment of effective local anti-racial-discrimination programs as a prerequisite to receipt of federal community development block grants).

148. See 26 U.S.C. §§ 103(a), 141-150 (1988 & Supp. II 1990).

149. See, e.g., 42 U.S.C. § 5306(d) (1988 & Supp. II 1990) (allocating 30% of federal Community Development Block Grant funds to the states for redistribution to localities selected by the states).

ties. Yet they should convey federal determination that no federal funds should be expended in furtherance of residential living patterns that have proved to be unnecessarily destructive to the social, economic, and educational prospects of millions of citizens of the United States.

IV. LOCAL FAIR SHARE OPTIONS

Under this Act, municipalities should be given a choice of pursuing racial or low-income housing objectives, since racial discrimination has both racial and economic dimensions, and since both must be addressed simultaneously to make meaningful progress on either.¹⁵⁰ Some commentators have advocated attacking residential segregation merely by providing (or permitting) more suburban low-income housing units, often with the expectation that African Americans, because of their disproportionate poverty, would be the chief beneficiaries of such programs.¹⁵¹ In effect, both *Mount Laurel* and New Jersey's Fair Housing legislation have followed such an approach. Because of the nation's widespread, unmet need for affordable housing, however, municipalities operating under such plans can and, as New Jersey's experience confirms, often do meet their low-income housing goals without any benefit to minority citizens.¹⁵²

On the other hand, analysts who propose to confront residential segregation directly, by establishing race-specific goals,¹⁵³ face several difficult questions. William Julius Wilson and other researchers have argued that race-conscious remedies that ignore economic differences rarely reach those lower-income blacks with the greatest need, instead almost invariably benefitting those African Americans who already possess the highest incomes, the most assets, and the greatest mobility.¹⁵⁴ The adoption of race-conscious residential goals also raises serious constitutional

150. See, e.g., 23 U.S.C. § 104(b)(1) (Supp. II 1990) (authorizing federal funds for use by states in construction of primary and secondary highways); *id.* § 144(e) (authorizing federal funds for state bridge replacement and rehabilitation); 49 U.S.C. § 1602 (1988) (authorizing federal funds for state urban mass transit programs).

151. See, e.g., Paul Davidoff & Linda Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509, 528-32 (1971); Thomas Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432, 1438 (1974).

152. See Boger, *supra* note 6, at 1331-34.

153. See, e.g., Michael F. Potter, *Racial Diversity in Residential Communities: Societal Housing Patterns and a Proposal for a 'Racial Inclusionary Ordinance'*, 63 S. CAL. L. REV. 1151, 1196 (1990) (advocating the adoption in California of a mandatory set-aside statute that would require developers of new residential housing projects to reserve 25% of all sale or rental units for racial and ethnic minority group members).

154. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 109-24 (1987).

and statutory questions; scholars and courts have long wrestled with whether public housing authorities and residential communities may constitutionally engage in "integration maintenance"—the self-conscious monitoring of, and interference with, housing markets to assure racial and ethnic stability in a community.¹⁵⁵

The National Fair Share Act attempts to avoid the problems of racial "ceiling" quotas by relying upon carefully crafted "floor" goals in municipalities throughout each metropolitan region. The Fair Share Act should require state planning agencies to calculate both (1) low-income housing need and (2) the racial and ethnic composition of each region. It would then calculate both a municipality's low-income goal and its racial goal, dependent upon various demographic factors, including the extent to which the demographic composition of the municipality departs from

155. Many commentators have emphasized a distinction under the Equal Protection Clause of the Fourteenth Amendment between minimum, or "floor," quotas for racial minorities, which guarantee some minority presence, and maximum, or "ceiling," quotas, which limit minority presence in the ostensible interests of maintaining integration. See, e.g., Bruce S. Gelber, *Race-Conscious Approaches to Ending Segregation in Housing: Some Pitfalls on the Road to Integration*, 37 RUTGERS L. REV. 921, 950-60 (1985) (arguing that "floor" quotas and affirmative marketing may be constitutionally permissible, but that "ceiling" quotas are unconstitutional and violate the Fair Housing Act); Polikoff, *supra* note 24, at 47-56 (supporting the constitutionality of race-conscious, affirmative counseling programs for homeseekers); Sander, *supra* note 14, at 926-28 (arguing that floor quotas, but not ceiling quotas or race-conscious assignments in a public housing context, might be constitutional if they are temporary); Note, *Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration*, 93 HARV. L. REV. 938, 947 (1980) (contending that benign steering of white homeseekers, but not benign ceiling quotas, would be constitutional); Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L.J. 377, 380-399 (1980) (arguing that benign steering of white homeseekers would be constitutional); cf. Bruce L. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 270-309 (1974) (defending both floor and ceiling quotas, albeit on different constitutional grounds); Dorn Bishop, *Fair Housing and the Constitutionality of Governmental Measures Affecting Community Ethnicity*, 55 U. CHI. L. REV. 1229, 1246-65 (1988) (arguing that all forms of integration maintenance devices, including floor and ceiling quotas and affirmative marketing, can survive constitutional and statutory scrutiny if they are narrowly tailored so that their integrative benefits outweigh their costs); Rodney A. Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's*, 58 S. CAL. L. REV. 947, 980-99 (1985) (arguing that all integration maintenance devices are unconstitutional and violative of the Fair Housing Act).

The Supreme Court has not addressed these issues in a housing context, and the lower courts are divided on their constitutionality. Compare *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1125 (2d Cir. 1973) (upholding a plan to maintain racial integration in a public housing project by limiting minority participation to 40% of the units) with *United States v. Starrett City Assoc.*, 840 F.2d 1096, 1100 (2d Cir.) (condemning use of racial ceiling quotas for minority applicants to federally-subsidized housing project, despite their prior approval as part of a court-supervised settlement), *cert. denied*, 488 U.S. 946 (1988) and *Burney v. Housing Auth.*, 551 F. Supp. 746, 753 (W.D. Pa. 1982) (striking a race-conscious tenant assignment plan that had the effect of preferring white applicants).

that of the metropolitan region as a whole.¹⁵⁶ The Act should then give each municipality an option whether to attempt to meet the state-designated low-income goal, the racial goal, or perhaps a "mixed goal" (which would delegate a municipality to designate percentages of *both* low-income units *and* of racially integrated units. Such a provision should require a sliding scale, with a proportionally smaller low-income housing goal for municipalities that agree to seek a greater percentage of minority residents, and vice versa). Different communities would choose to pursue one of these options after assessing such factors as their present demographics, their rate of housing development (and, therefore, the likelihood of achieving low-income housing goals through market-driven density bonuses or set-asides), the funds available from federal, state, and local sources to build subsidized rental housing, nonprofit housing development, etc. For example, older municipalities lacking undeveloped land for new development, and without adequate federal, state, or local funds to subsidize low-income renters in scarce, high-rental apartments, might be drawn toward racial integration goals. This approach would lead such municipalities to establish and support local fair housing groups, or perhaps to engage in affirmative marketing, or conduct real estate seminars to instruct local realtors on how best to comply with fair housing laws.¹⁵⁷ Such communities might reason, moreover, that middle- to upper-income black professionals and managers ultimately would be more desirable neighbors and more reliable taxpayers than lower-income residents of any race.¹⁵⁸

Younger communities undergoing strong private residential devel-

156. Jargowsky and Bane recently illustrated how widely demographic patterns and changes differ among various metropolitan areas. Paul A. Jargowsky & Mary Jo Bane, *Ghetto Poverty in the United States, 1970-1980*, in *THE URBAN UNDERCLASS*, *supra* note 126, at 235, 269-70.

157. These are among the activities proposed by George Galster and others as prerequisites for community receipt of federal funds. See GALSTER, *supra* note 29, at 25. One intended virtue of the National Fair Share approach is its clear placement of responsibility to identify effective desegregation methods on municipal decision-makers themselves; unless the methods they adopt actually work to meet the municipality's fair share goal, serious adverse consequences will automatically follow. Thus, municipalities will be strongly motivated to select effective remedies, rather than to delay or make remedial choices that, while formally adequate, will not achieve meaningful results.

158. Some researchers have suggested that contacts between members of different racial and ethnic groups have a far greater likelihood of success if the parties are of roughly equal educational and income status. See, e.g., Yinger, *supra* note 26, at 292 (observing that "[c]onflict between participants and residents will be minimized . . . where the residents' income and preferences are as similar as possible to the participants' income and preferences"); Denton & Massey, *supra* note 16, at 797 (noting that "the early Chicago school theorists . . . believed that the level of segregation reflected the social distance between groups . . . [and] that socioeconomic advancement by ethnic groups would lead to their progressive integration in society").

opment, by contrast, might decide to make greater use of market forces to meet low-income housing goals, and thus to concentrate on low-income housing production. In either case, the Act would draw on the resourcefulness and common sense that local municipalities always bring to those problems they *want to solve*, rather than those they want to avoid.

Lower-income housing goals typically would be more expensive to implement, since they would involve some form of subsidized housing. Racial integration goals, by contrast, could be met in many communities without municipal housing subsidies by developing affirmative market programs designed to induce black homebuyers or renters to choose housing there. The bias of the selection process would thus tend to favor racial integration goals; indeed, if the program worked ideally, many municipalities might well find themselves in an informal competition to offer more attractive housing options to minority homeseekers throughout the region.

Presumably, if the program worked as hoped, the need for integration maintenance would diminish substantially. At present, many observers have noted that suburban municipalities that welcome minority residents risk resegregation as a disproportionately large number of minority homeseekers and renters, frustrated by encounters with realtors and brokers practicing discrimination in other municipalities, turn to the "open" community.¹⁵⁹ Yet, if African-American homeseekers were truly afforded a wide variety of housing choices, it is likely that their residential choices would become less skewed toward a handful of compliant communities and instead would be distributed more widely throughout a metropolitan region, based on individual employment choices, school choices, or other non-racial characteristics.¹⁶⁰

The Act possibly could provide for a third option not fully explored in this Essay. In some metropolitan regions, chiefly in the South and the West, metro-wide government is the rule; schools, housing authorities, municipal hospitals, and other public services are shared throughout geographically extensive areas.¹⁶¹ Under such circumstances, low-income

159. See GALSTER, *supra* note 29, at 11-12.

160. If blacks begin to appear in all or most neighborhoods—even if in small numbers—the widely accepted notion that the entry of a few black households into a neighborhood or community signals the start of a certain process that must end in that neighborhood or community becoming an all-black slum will become less credible.

John F. Kain, *Housing Market Discrimination and Black Suburbanization in the 1980s*, in DIVIDED NEIGHBORHOODS, *supra* note 16, at 68, 82; see also Sander, *supra* note 14, at 901.

161. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FISCAL DISPARITIES: CENTRAL CITIES AND SUBURBS, 1981, at 11 (Aug. 1984) (noting the difference between

residents and racial minorities are not invariably deprived of adequate public goods by the pattern of balkanized local governments so prevalent in the Midwest and Northeast.¹⁶² Since the proposed legislation, as observed above, will assure its beneficiaries access only to a municipality itself, not to any particular neighborhood, there is some merit to the argument that an urban area that chooses to govern itself regionally, and to distribute its public goods and services to all within the region, already has achieved most of what the Act aims to accomplish.¹⁶³

Yet it is possible to imagine metro-governments, unitary in formal terms, that are subdivided administratively into segregated units for educational, health care, and other purposes so as effectively to deny low-income and minority citizens access to average public goods and services. If so, the formal citizenship in the overall metro-government would not suffice to meet the integrative goals of this Act.

Moreover, both the proposed low-income goals and racial integration goals implicitly promise new or rehabilitated low-income housing resources, an outcome that would not follow from the metro-government option. In a nation still deeply in need of additional low-income housing resources,¹⁶⁴ this might prove a decisive factor in assessing whether to include a metro-government option in National Fair Share legislation.¹⁶⁵

"Eastern" metropolitan areas, characterized by stark contrasts between central cities and suburbs, and "newer" cities of the South and West, which have used aggressive annexation to create cities with "substantial suburban characteristics"); David Rusk, *Cities Without Suburbs*, NEW DEMOCRAT, May 1992, at 17, 18-19 (indicating the changes in metropolitan areas in the United States between 1940 and 1990 that have created "cities without suburbs").

162. David Rusk reports that cities which have aggressively annexed their surrounding suburbs "have avoided segregation by race and economic class better than others," and that "creating a more open society also seems related to maintaining broad public institutions, such as the dominant city or county governments, or county-wide school systems, which link 'city' and 'suburb.'" Rusk, *supra* note 161, at 19.

163. Anthony Downs anticipated this possible solution in 1973:

Admittedly, opening up the suburbs is not the only way to counteract existing fiscal disparities. One much simpler remedy would be dissolving the political boundaries that fragment each metropolitan area and creating a single metropolitan government.

This has been done in Indianapolis, Nashville, and Jacksonville.

Downs, *supra* note 22, at 40.

164. CENTER ON BUDGET AND POLICY PRIORITIES/LOW INCOME HOUSING INFORMATION SERVICE, A PLACE TO CALL HOME: THE LOW INCOME HOUSING CRISIS CONTINUES 3-4 (1991) (reporting that in 1989, the difference between the number of low-income households and the number of available units was 4.1 million, a much wider gap than at any point during the 1970s).

165. Furthermore, since a major purpose of the National Fair Share legislation is to overcome residential segregation's role in creating a "spatial mismatch" that prevents urban racial minorities from reaching areas of suburban job growth, a metro-wide government could meet this objective of the Act adequately only if it provided a mass transit system to city residents that would afford ready access to major metropolitan employers. See Kain, *supra* note 13, at 450 (evaluating the research findings in support of the spatial mismatch hypothesis).

V. CONCLUSION

A National Fair Share proposal would not directly provide jobs, health care, preschool education, larger welfare benefits, or other crucial social services to those who need them most.¹⁶⁶ Nor would it directly address the desperate need of our beleaguered cities and their residents for aid with their immediate problems. Yet pilot programs such as the *Gautreaux* experiment demonstrate that a successful fair share program would afford multiple, substantial benefits to most fair share participants.¹⁶⁷ Moreover, by creating housing options for low-income and minority citizens in suburban areas, the fair share program should diminish the pressure for, and thereby lower the market price of, urban housing units. It should also widen the employment choices of urban residents, reduce pressures on overcrowded urban school systems, and spread the local costs of social services among municipalities throughout each metropolitan region.

Apart from these more concrete gains, a fair share program would gradually, over the course of a decade, begin to redirect America's current drift toward economically homogeneous, racially segregated, mutually antagonistic geographic areas. One of the most important achievements of American society has been its ability to provide meaningful social mobility for millions of lower-income citizens. This social fluidity, though failing millions who find themselves locked into almost insurmountable poverty, nonetheless has lifted millions more into middle-class status, forestalling the crystallization of deep, destabilizing inter-class antagonisms like those that plague less mobile societies. The National Fair Share legislation should serve these basic American social goals.

Some have worried that "dispersal" strategies might undermine hard-won minority political control of many cities throughout the coun-

166. In a series of helpful articles, George Galster has attempted to unravel the multiple, complex causes of minority poverty, a "web of mutually reinforcing connections in which elements serve both as causes and effects." George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1422 (1993); George C. Galster, *A Cumulative Causation Model of the Underclass: Implications for Urban Economic Development Policy*, in BLACK & WHITE, *supra* note 17, at 190, 191; George C. Galster, *Research on Discrimination in Housing and Mortgage Markets: Assessment and Future Directions*, 3 HOUSING POL'Y DEBATE 639, 639 (1992). Galster's analysis strongly reinforces the argument that no one policy prescription alone can abate the forces or heal the multiple injuries from American racial subordination of its African-American citizens. Nonetheless, the Kerner Commission's analysis, to which I largely assent, strongly suggests that ending residential segregation for a substantial fraction of today's urban minority population could have useful long-term benefits for individuals, for cities, for the suburbs, and for the nation as a whole.

167. Rosenbaum et al., *supra* note 127, at 1552-56.

try.¹⁶⁸ Such concerns overestimate the likely dispersal effect of even the most successful fair share program, with a purpose not to depopulate cities or scatter their entire low-income and minority populations, but only to ensure that some fraction of the poor and middle-income minorities trapped in central cities have the choice of suburban living, and that suburban communities do not become so economically homogeneous that their residents lose all political and economic motivation to support national policies that benefit poor and minority citizens.¹⁶⁹ It is almost certain that the population of America's largest cities would remain disproportionately African American, Latino, and Asian even if some re-population of urban areas by some whites accompanied the end of the current segregation.

Since 1968, we have lost nearly an entire generation of poor and minority children, cut off from adequate medical care, adequate schools, decent housing, and mainstream labor markets.¹⁷⁰ It is no idle charge that segregative forces presently are contributing to the perpetuation of a social and economic "underclass."¹⁷¹ While at this writing no political

168. See, e.g., Wilhelmina A. Leigh & James D. McGhee, *A Minority Perspective on Residential Racial Integration*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 24, at 31, 36 (contending that "[t]o the extent that the movement of blacks from cities to suburban areas reduces their numbers in inner-city voting jurisdictions, they are reducing their power as the plurality or majority of voters in certain wards"); Georgia A. Persons, *Racial Politics and Black Power in the Cities*, in BLACK & WHITE, *supra* note 17, at 166, 185-87 (arguing that "[t]he politics of suburbia is both strongly anti-city and heavily racially tinged," putting suburban blacks at a decided political disadvantage). Cf. Norman Krumholz, *The Kerner Commission Twenty Years Later*, in BLACK & WHITE, *supra* note 17, at 19, 25-31 (arguing that black urban power is a "prize of substantial value to the African-American citizens of a city, and a prize worth fighting for").

169. Anthony Downs long ago observed that there might be some political advantages to an increasing black political presence in suburban communities:

[T]he presence of at least some black residents in most suburban areas would greatly reduce the probability that white suburbanites would define suburban interests in ways that are antiblack as well as anti-central-city. Black suburbanites would be able to exercise at least some beneficial influence that would not arise if nearly all blacks remained in central cities.

Downs, *supra* note 22, at 82. See generally Robert Reinhold, *The Electorate: Chasing Votes from Big Cities to the Suburbs*, N.Y. TIMES, June 1, 1992, at A1, A11 (examining the demographic realignments following the 1990 census and their implications for the political and racial loyalties of suburban politicians).

170. See generally ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* (1991) (chronicling two years in the lives of two "underclass youths" growing up in inner-city Chicago); CHILDREN'S DEFENSE FUND, *S.O.S. AMERICA! A CHILDREN'S DEFENSE BUDGET* (1990) (advocating a "peaceful transformation" to an America that ensures no child will grow up without health care, food, shelter, or education).

171. See generally Erol Ricketts, *The Underclass: Causes and Responses*, in BLACK & WHITE, *supra* note 17, at 216 (focusing "on some of the major agreed on causes of the underclass and the expected direction that the responses motivated by subscription to these causes

consensus has emerged to reverse these devastating trends, our national experience provides remarkable examples of transformative political moments when genuine, far-reaching reforms previously considered unthinkable have been adopted with broad popular support.¹⁷² The fair share legislation proposed in this Essay is designed for such a period of national reconstruction, with the hope that it might one day contribute to a reversal of the ominous threat to our national future that is posed by residential segregation.

would take"); WILSON, *supra* note 154, at 6-8 (noting the causes of the social and economic dislocation of the "ghetto underclass").

172. See generally W.E.B. DuBois, BLACK RECONSTRUCTION IN AMERICA 1860-1880 *passim* (Meridian Books 1964) (1935) (describing the legislative and social achievements of the post-Civil War Reconstruction era); ERIC FONER, RECONSTRUCTION 1863-1877: AMERICA'S UNFINISHED REVOLUTION *passim* (1988) (same); ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL 1933-1934 *passim* (1958) (describing the legislative achievements of President Franklin Roosevelt's New Deal); Michael B. Katz, *Reorganizing the Nation*, in IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 206, 206-47 (1986) (describing the broad social welfare reforms adopted during the New Deal of the 1930s); Taylor, *supra* note 48, at 1701-17 (describing the significant legislative achievements of the civil rights era of the 1960s); PROGRESS AGAINST POVERTY: A REVIEW OF THE 1964-1974 DECADE 47-188 (Robert D. Plotnick & Felicity Skidmore eds., 1975) (describing President Lyndon Johnson's War on Poverty programs).